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THE
Real Property Statutes

PASSED IN THE REIGNS OF

WILLIAM IV. AND VICTORIA;

INCLUDING

**PRESCRIPTION—LIMITATION OF ACTIONS—ABOLITION OF FINES, &c.
AND JUDGMENTS, &c. &c.**

WITH

C O P I O U S N O T E S,

AND

FORMS OF DEEDS.

—◆—
Fourth Edition,

CORRECTED AND ENLARGED, WITH NEW CASES AND STATUTES.

—◆—
BY

LEONARD SHELFORD, ESQ.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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LONDON:

**S. SWEET, 1, CHANCERY LANE; A. MAXWELL & SON, 32, BELL YARD;
AND STEVENS AND NORTON, 20 & 30, BELL YARD;**

Law Booksellers and Publishers:

AND A. MILLIKEN, GRAFTON STREET, DUBLIN.

—
MDCCCXLII.

LONDON:
C. ROWORTH AND SONS, BELL YARD,
TEMPLE BAR.

ADVERTISEMENT

TO THIS EDITION.

THE last edition of this work having been some time out of print justifies the expectation that a new and improved edition may be acceptable to the Profession and the Public. Considerable pains have been taken with this edition, and as nearly all the decisions upon the statutes comprised in this volume have taken place since the publication of the last edition, much labour has been required in collecting and digesting those cases and others connected with the subjects of this work.

Notwithstanding the omission of the statute and notes relating to tithes, which more properly belong to another work by the author, and the omission of the statute relating to the exchange of lands in common fields, the work has assumed a much larger bulk, which it is hoped will not detract from its utility.

It must be a subject of regret to all those who are desirous of seeing needful and just alterations in the law effected, that the numerous stamp acts now in force have not been consolidated and amended.(a) A bill, having that object, removing some of the

(a) See 1 Real Prop. Rep. 547, 159, 447, 455, 465, 589, 590, 592, 606.

difficulties occasioned by the complicated rules of the present stamp acts, and containing a more equitable scale of duties, was introduced in the House of Commons in the year 1836, by the then Chancellor of the Exchequer, but no satisfactory reason has ever been assigned why this salutary measure has not been carried into effect. No doubt can be entertained as to the propriety of defining with as much certainty as possible the proper stamps to be used upon legal instruments, which cannot be given in evidence unless properly stamped. It will also probably be conceded that a scale of *ad valorem* duties, regulated by an increase of a certain amount per cent. will be more just than the present scale, inasmuch as the burthen would be proportioned to the means of the parties.

FIRST FLOOR,
3, BRICK COURT, TEMPLE.
August, 1842.

PREFACE

TO THE FIRST EDITION.



THE Statutes relating to Real Property, comprised in this volume, and passed in the last session of Parliament, materially affecting every title to that species of property in this kingdom, demand the attentive consideration of every legal practitioner who takes upon himself the responsibility of advising on the transfer or settlement of estates. It is probably generally known, that in the year 1828 a commission was directed to five commissioners, "to make diligent and full inquiry into the law of England respecting Real Property, and the various interests therein; and the methods and forms of alienating, conveying, and transferring the same, and of assuring the titles thereto; and whether any and what improvements could be made therein, and how the same might be best carried into effect." Those commissioners, and two others since appointed, have made four Reports, which have been ordered by the House of Commons to be printed; the First on the 20th May, 1829, upon which the new enactments are principally founded.

The Second Report, relating entirely to *registration*, was ordered to be printed on the 29th July, 1830. A bill, founded upon it, for establishing a general register for all deeds and instruments affect-

ing real property in England and Wales, was introduced in the House of Commons, on the 16th December, 1830; (see *Parl. Deb. Vol. I. 1233—1267*;) and has been brought forward in the three succeeding sessions of Parliament, but has not yet received the sanction of the legislature.

The Third Report was ordered to be printed on the 24th May, 1832, and includes the following subjects, viz. tenures, contingent remainders, future estates and perpetuities, covenants, and a period of limitation for the rights of the church.

The Fourth Report was ordered to be printed on the 25th April, 1833, and contains observations on wills under the following heads: 1st. As to the mode of the execution of wills. 2d. As to the persons by whom they may be made. 3d. As to the property which may pass by them. 4th. As to the time from which they take effect. 5th. As to their revocation. 6th. As to their republication; and, 7th. As to their proof or probate. (a)

The Third and Fourth Reports suggest a variety of important alterations, which it may be anticipated will soon be submitted to the consideration of Parliament.

The new enactments are in some instances in complete derogation of the common law, and former statutes; in other, declaratory of old statutable provisions and rules of law, or analogous decisions in

(a) Many of the propositions contained in this report, have been carried into effect by the stat. 7 Will. 4 and 1 Vict. c. 26. See 1 *Hayes on Convey.* 341—348, 4th ed.; 2 *Sugd. V. & P.* 243—260; *Shelford on Wills*; *Sweet on Wills*.

equity; and, in a few cases, introductory of rules before unknown in our system of jurisprudence.

An attempt is made in the notes to give some explanation of the acts, by reference to some of the principles and decisions upon which they are founded, so as either to afford a contrast between the old and new rules, or an illustration of them where they do not differ essentially from the law previously established. To have entered fully upon all the subjects which the new acts suggest for consideration, would have required several distinct treatises.

The greatest novelty in the new acts, at least in terms, is the protector of the settlement, who is for the most part a substitute for what was before called the tenant to the *præcipe*, his office being to grant or withhold his consent, which is required to enable a tenant in tail *in remainder* to bar not only his own issue, but also those in remainder, to the same extent as might before have been effected by a recovery; for a remainder-man alone may still bar his own issue under the new act as effectually as he might have done before by a fine. It must, however, be recollected that the protector under the new act, at least as to settlements made after the 31st December, 1833, will not in many respects correspond with the person who was called tenant to the *præcipe*, as some persons who would have been the latter are excluded from the protectorship.

Whatever merit the new enactments possess, it is impossible not to foresee that many nice questions will arise upon their construction, although they are not often anticipated in this work; and that for

many years to come the difficulty of advising on titles will be increased, as it will be necessary to bear in mind two systems of law—the old as to past, and the new as to future transactions.

In order to facilitate reference to the new enactments, and to give a general outline of their object, an analysis of each act is given in the contents. The table of descents is applicable to the law as altered by the recent act.

Some Forms of Deeds, framed with reference to the provisions in the Act for the abolition of Fines and Recoveries, and the Dower Act, are added in the Appendix, under an impression that they may, at least, assist the inexperienced conveyancer in preparing the new forms of assurances, and tend to illustrate the acts which have occasioned them. The apology for inserting some provisions with which the profession are familiar, and recitals of facts, is, that mere skeletons of deeds are of little practical utility, and would not have shown the consequent alterations required in the established forms; and without recitals, it would not have appeared to what circumstances the forms were intended to apply.

As no Rules for regulating the practice as to the certificates of acknowledgment of deeds by married women have yet been promulgated, the forms must be taken subject to any alterations which such rules may render necessary.

3, BRICK COURT, TEMPLE.

November 8th, 1833.

INTRODUCTION.

It is proposed to introduce in this place some observations upon the right of purchasers to require abstracts of title and the period of time to which they must extend under the new law. Some remarks upon conditions of sale are also added.

It is well known that every vendor of real property is under an obligation of showing a good title to the interest he proposes to sell; possession alone, although an important circumstance when it has been long and uninterrupted, is not even *prima facie* evidence of title; for the party in possession may hold as tenant at sufferance, at will, from year to year, for a term of years, for life, or subject to charges, or as mortgagee, or in respect of some other estate, not conferring a power of conveying the interest agreed to be sold. There may be good titles in which the origin of them cannot be shown by any deed or will; but in such cases something satisfactory must be produced that there has been such a long uninterrupted possession, enjoyment and dealing with the property as to afford a reasonable presumption that there is an absolute title in fee simple (a). This right of a purchaser to require

(a) *Cotterell v. Watkins*, 1 Beav. 361; 3 Jur. 283.

the production and proof of a satisfactory title does not arise in consequence of an express agreement between the parties, but it is implied by law ; for every person who contracts for the sale of an estate, or an interest in it, without qualification, asserts in fact that he has power to sell, and, consequently, that he has a good title. Where there is an *express* stipulation to give such a title as shall be *satisfactory* to the purchaser, the usual objections only can be taken. (b) A vendor is not only bound to exhibit a good title by the abstract but to verify it by the production of the necessary documents. If a vendor intends to deprive a purchaser of the right to the production of any evidence necessary to verify the title beyond what the title-deeds in his own custody will supply, he is bound to make that intention previously known to the purchaser, in clear and explicit terms. By one of the printed conditions of sale, the plaintiff undertook to give a good title to an estate ; and by another condition the plaintiff was not to be called on to produce the original deeds not in his possession : it was held, that the plaintiff was bound to verify the abstract of title delivered by him, although some of the deeds were out of his possession. (c) Where the title-deeds are in the hands of persons residing in different parts of the country, the vendor must bear the expense of the purchaser sending a clerk to compare the abstract with the deeds. (d). It is now settled, after some

(b) *Lord v. Stephens*, 1 Younge & Collyer, 222.

(c) *Southby v. Hutt*, 2 Mylne & Cr. 207 ; 1 Jurist, 100.

(d) *Hughes v. Wynne*, 8 Sim. 85.

conflicting cases, (e) that there is in every contract for the sale of a lease, unless there be a stipulation to the contrary, an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself; which implied undertaking is available at law as well as in equity. And it will not be inferred, from the short remainder of the term, the small value of the property, and the absence of any premium for the lease, that the parties intended to waive the question of title. (f) A lease for lives, held under a bishop, which has been renewed from time to time for a considerable period, seems to be an exception to the rule. (g)

There appears to be no case in which it has been held that a delivery of the vendor's title-deeds is equivalent to the delivery of an abstract. In an action against a purchaser of a leasehold estate at an auction for not completing the contract, it was averred in the declaration, that the vendor had delivered an abstract of title pursuant to the conditions of sale, which averment the defendant traversed by his plea: it was held that the allegation was not sustained by proof that the vendor caused the lease and assignment, which composed the whole title, to be handed to the purchaser for perusal, and offered to send them to his attorney, to enable him to prepare the necessary assignment. (h) Upon the death of one of two partners, intestate,

(e) 2 Sugd. V. & P. 140—153, 10th ed.; 7 Jarm. Conv. 368.

(f) *Souter v. Drake*, 3 Nev. & Mann. 40.

(g) *Fane v. Spencer*, 2 Meriv. 430, n.

(h) *Horne v. Wingfield*, 3 Scott, N. R. 340.

the personal representatives of the deceased partner agreed to sell his moiety of the real property of the partnership to the surviving partner, and at the same time stipulated that they would furnish him at their own expense with an abstract of their title to that moiety: it was held that they were bound to furnish the usual abstract of title, and not merely the letters of administration under which they acted in relation to the intestate's personal estate. (i) The declaration stated, that the defendant caused to be put up to sale by auction certain premises, for the residue of a term of years, on the condition, amongst others, that the defendant should deduce and make a good title thereto, commencing with the lease of the premises under which they were then held; and assigned as a breach, that the defendant did not deduce a good title commencing with the lease. Plea, that the premises so put up to sale were premises of which the defendant was possessed under a mortgage from the plaintiff for the residue of the term, and that they were put up to sale under a power of sale in the mortgage; that before and at the time of the mortgage the plaintiff held the premises under a lease from T. L. subject to a covenant by the plaintiff for repair, and a proviso for re-entry, on the cesser of the term, at the option of T. L. on breach of such covenant: that the plaintiff, before and at the time of the sale, had full knowledge of all the premises: that the defendant did deduce a good title to the premises, commencing with the lease, in

(i) *Morris v. Kearsley*, 2 Younge & Coll. 139.

all respects except this, that the premises were out of repair, of which the plaintiff had full knowledge : that they were, at the time of the sale, in as good repair as at the time of the mortgage : and that T. L. had not re-entered or claimed to re-enter, or in any way avoided the lease. The plea was held bad, and no answer to the declaration. Alderson, B., said, if a bill had been filed for a specific performance of the contract of sale, it would have been matter for the consideration of the Court of Equity, whether it ought or ought not to order the defendant to obtain a release from the landlord. (*k*)

Upon the sale of leasehold property, it is the duty of the purchaser to inquire into the covenants and stipulations of the original lease ; therefore where a leasehold property about to be sold was described in the particulars of sale as being held at a ground rent of 86*l.* per annum, and it appeared from the lease that the ground rent was 50*l.* and one-third of the improved yearly rent or value ; and there were other stringent covenants in the lease not noticed in the particulars, such as, that no fine should be taken for an under-lease or assignment, except with the consent of the reversioner, &c. : it was held, nevertheless, that the purchaser must be held to his contract. (*l*) In the case of the sale of a lease, in which is a covenant by the vendor not to assign his interest, it is incumbent on him and not on the

(*k*) *Barnett v. Wheeler*, 7 Mees. & W. 364 ; *Wheeler v. Wright*, Ibid. 359.

(*l*) *Pope v. Garland*, 4 Younge & Coll. 394.

purchaser to procure the lessor's licence for the assignment. (m)

A vendor may, however, stipulate for the sale of an estate with such title as he happens to have; and thus limit his implied undertaking to make a good title. A person who contracted for the purchase of the next presentation to a living, "on having such title as the vendors had received," was held bound to accept it, although it appeared to be defective.(n) So a vendor may stipulate for the waiver of a specific defect in the title, however radical and incurable. (o)

So where the vendor agreed to sell leaseholds for a certain term, "as he held the same," and the purchaser agreed to accept a proper assignment of the premises "without requiring the lessor's title," the purchaser was precluded from calling in question the lessor's title to grant the lease. (p)

Where the assignees of a bankrupt, in putting up to sale his interest in an estate, provided by the conditions of sale that the purchaser should have an assignment of the bankrupt's interest in the estate, "under such title as he lately held the same, an abstract of which might be seen at a particular office," it was held that the purchaser could not insist upon any other title than such as the bankrupt had; (q)

(m) *Lloyd v. Crispe*, 5 Taunt. 249.

(n) *Wilmott v. Wilkinson*, 6 Barn. & C. 506; S. C. 9 Dowl. & Ryl. 620.

(o) *Corrall v. Cattle*, 4 Mees. & W. 784.

(p) *Spratt v. Jeffery*, 10 Barn. & C. 249; S. C. 5 Mann. & Ryl. 188.

(q) *Freme v. Wright*, 4 Madd. 364.

but where a vendor provides by the conditions of sale that he will give to the purchaser only certain specified deeds, Lord Eldon is reported to have said, that the purchaser is not bound to take a bad title, or such title as appears upon the deeds. (r) Conditions of sale, describing a title to premises as arising under an exchange, by virtue of an award of commissioners under an inclosure act, are satisfied by showing a title by award in respect of other lands and of common rights, without showing the further particulars of the exchange; and if the vendor contracts to commence his title with the award, the purchaser has no right to inquire into the title of the lands given by the vendor in exchange for the lands contracted to be sold. (s) The father being tenant for life, and his son tenant in tail, the father was made a bankrupt, his assignees contracted to sell the estate to the son, with a stipulation he should not require a further title than the will of his grandfather. The son's solicitor said that he did not require any abstract, because the son derived under the same title. He then made objections as to the insolvency and bankruptcy of the father, and it was held that he had not waived such objections. (t)

Where a purchaser had waived his right to a reference as to title to the master, who was only ordered to settle the lease, and in doing so circum-

(r) *Dick v. Donald*, 1 Bligh, N. S. 655.

(s) *Cattell v. Corrall*, 4 Y. & Coll. 228.

(t) *Sidebottom v. Barrington*, 3 Jurist, 947.

stances were disclosed showing that the vendor could not make a valid title to the lease which he had undertaken effectually to grant, the court would not decree a specific performance, (u) and a purchaser of leaseholds by auction was held entitled to avail himself of a defect in the lessor's title, which he had discovered, notwithstanding the conditions of sale provided "that the vendor should not be obliged to produce the lessor's title." (x)

Where the assignee of a lease, who on a sale of it stipulated not to produce any title prior to the lease, brought an action against the purchaser for not completing his purchase, and in the declaration it was stated that the vendor was possessed of the lease, it was held that, the purchaser having rejected the abstract, the vendor was bound to prove the execution of the lease by calling the attesting witness, and that it was not sufficient to prove the assignment to the vendor. (y)

The established practice of conveyancers has long been to require the regular deduction of a title for sixty years at least ; and very frequently, owing to particular circumstances, for a longer period. It is impossible to define beforehand all the particular circumstances which render it necessary to extend the abstract beyond that period, if the contents of the abstract lead to the conclusion that there were

(u) *Warren v. Richardson*, 1 Younge, 1.

(x) *Shepherd v. Keutley*, 1 Cr. Mees. & Rosc. 117; S. C. 4 Tyrw. 571.

(y) *Laythoarp v. Bryant*, 1 Bing. N. S. 421.

estates tail subsisting, it is necessary to call for the prior title. So where an abstract commences with a fine or recovery, or with a statute deed to bar an entail, it is proper to call for the production of the assurance creating the entail, in order to see that the parties were competent to bar the entail. Indeed, whenever any statement in the abstract leads to a fair inference of the existence of a defect in the prior title, the purchaser may require it to be explained by the production of the prior title. Although recitals in deeds of the pedigree of parties who conveyed the estate may be evidence as against the parties to such deeds, yet they cannot be evidence of pedigree as against third persons. (z) Lord *Eldon* was of opinion that it was a serious objection to a title that an abstract did not go further back than forty-three years. (a) The period of sixty years was probably fixed partly with reference to the limitation of real actions, (b) and partly with reference to the *duration of human life*, and the existence of particular estates; for an estate may be held adversely, and dealt with as an estate in fee simple during a life or lives, and the existence of particular estates, without affecting the rights and remedies of those in remainder. Although the recital of a deed is constructive notice of its contents, a purchaser will be compelled to complete his contract without

(z) *Foot v. Clarke*, 1 Russ. 601.

(a) *Paine v. Meller*, 6 Ves. 349; see *Robinson v. Elliott*, 1 Russ. 599.

(b) 32 Hen. 8, c. 2; *post*, pp. 127—129; see *Barnwell v. Harris*, 1 Taunt. 430.

the inspection of every deed, unless the absence of the deed recited throws some reasonable doubt upon the title of the vendor; and therefore, when the title under the conveyance containing the recital is fortified by sixty years subsequent undisputed possession, the loss of the deed recited will not throw such a reasonable doubt upon the title of the vendor as will prevent the court from decreeing a specific performance. (c)

In general, real actions (with the exception of those for recovering dower and advowsons) will not lie after the 1st of June, 1835, although after that time, any person whose right of entry shall then have been taken away by *descent cast, discontinuance, or warranty*, may bring a real action within the period prescribed for making an entry by the new statute of limitations. Real actions, therefore, will lie in the three last mentioned cases after the 1st of June, 1835.

It is a question of much practical importance, whether, when real actions shall be completely worn out, purchasers will be entitled to require abstracts of title for the same period as heretofore. It must however be remembered, that the 38th section of the stat. 3 & 4 Will. 4, c. 27, saving the rights of persons to real actions on the 1st June, 1835, is still in operation. (d) The Real Property Commissioners, upon whose suggestions the new

(c) *Prosser v. Watts*, 6 Madd. 59.

(d) See *post*, pp. 225, 226.

statute of limitations is founded, after noticing the length of abstracts as a growing evil, which called loudly for remedy, expressed an opinion "that some diminution of the evil will be produced by shortening and making uniform the period of limitation, although to guard against the fabrication of fee simple titles by persons in possession under particular estates, it will still be requisite to investigate titles for a greater number of years than the period which may be prescribed." (e)

As far as the rights of the crown are concerned the new act has made no alteration, for the crown not being expressly named in it, does not come within its operation. Remainders and reversions expectant on the determination of estates tail of the gift of the crown are also not to be affected by the new modes provided for barring estates tail. There is nothing, therefore, in the new acts dispensing with the necessity of requiring, when the title depends upon a grant from the crown, the production of the original grant, in order to show that no remainder or reversion remains in the crown, although it is unnecessary to trace the title through all the intermediate stages. Corporations of every description (except the crown and such as are spiritual and eleemosynary, as to the latter of which special provision is made,) (f) being within the new statute of limitations, may, under certain circum-

(e) 1 Real Prop. Rep. 41. See 2 Sugd. V. & P. 132—140, 10th ed.

(f) See *post*, p. 170.

stances, be barred by twenty years' possession. (*g*) Tithes not belonging to spiritual or eleemosynary corporations sole, are within the act, and subject to the same periods of limitation as lands. The statutes 6 & 7 Will. 4, c. 71, s. 71, 1 & 2 Vict. c. 64, and 2 & 3 Vict. c. 62, s. 6, have facilitated the merger of tithes. Before those acts there was no mode of effecting a merger of impropriate tithes, although the fee of both the estate and tithes was vested in the same person. (*h*) Where a merger has been effected under those statutes, the title to the tithes and land will be consolidated from the time the merger took effect, but it will still be necessary to require the production of the title to the tithes, and of the grant from the crown. The statute 2 & 3 Will. 4, c. 71, has removed some of the difficulties which formerly existed with respect to the proof of a *modus* or composition real.

It is clear that a title may be acquired under the new statute of limitations by possession for twenty years. Thus, if a person under no disability, who was indisputably tenant in fee, be wrongfully kept out of possession for that period, and there be no payment of rent nor acknowledgment of his right by the party in possession, the remedy of the rightful owner will be gone. But on the purchase of such property it would be necessary to require a title for a longer period than twenty years, for the purpose of showing that the person who had been

(*g*) See *post*, pp. 116—164.

(*h*) See 1 Real Prop. Rep. 55, 56.

so dispossessed was tenant in fee at the time when the dispossession commenced, and to trace back the right to the fee for such a period as would afford a reasonable probability that there was no subsisting right of entry on the determination of any particular estate. It is not intended to be suggested that a title depending upon possession for twenty years, liable as it is to be rebutted by evidence of an acknowledgment of right in others, is such as an unwilling or cautious purchaser would be bound or advised to accept, but only to point out that by the present law a title may be acquired in that time. On the other hand, an estate may have been held adversely for sixty years, and even more, without the possessor having a title. Thus, suppose a *mere* tenant for life to have been dispossessed of an estate, or to have sold and conveyed it as tenant in fee, fifty years ago, and to be still living, the person really entitled in remainder on the determination of the life estate will have twenty years from that time, or, in consequence of disabilities, a more extended period within which he may now recover the property by ejectment.

The extreme period of forty years, prescribed by the new act, applies to persons who shall be under disability at the time when their right *first* accrued, and who shall continue during that period either under the same disability, or under an uninterrupted succession of disabilities. Thus, for example, suppose an estate in fee to descend to a female infant, who during her minority marries, and remains under coverture for a period exceeding forty years from

the time her right originally accrued, under the new statute she will be barred, but by the old law she or her heirs might have recovered the property within ten years after she had ceased to be under any disability. Suppose, in the last case, that the estate had been devised to the infant for her life, the persons entitled in remainder or reversion will still have twenty years from her death within which to recover the property. Hence it is apparent, that before forty years' possession against an owner, under disabilities, can be relied on, it must appear that such owner was not a mere tenant for life.

One insecurity, against which it was necessary to guard, under the old law, was estates tail in remainder or reversion coming into possession after prior tenants in tail, and their issue had been barred by adverse possession, or perhaps for a long time had lost all interest in the property by the creation of a base fee, which lasted so long as the tenant in tail had issue, but on the failure of such issue the remainder took effect. And a recent but extreme case is stated in the First Real Property Report, (p. 46,) of a claim effectually made under an estate tail which had vested in possession immediately before the making of the claim, although created in the reign of Queen Elizabeth. The possible existence of latent entails frequently lead to great expense on the transfer of real property, by rendering it necessary to require an abstract to show a title for nearly a century, and if it appeared that the property was in settlement at the commencement of such period, earlier title-deeds were called for, in order to see

what estates tail in remainder had been created, and whether they had been effectually barred. The 21st, 22d, and 23d sections of the Statute of Limitations will tend materially to secure purchasers against latent entails, and claims by issue, remainder-men, and reversioners, in cases where defective assurances have been made by tenants in tail, and where they or their alienees have acquired a title by adverse possession, and will supersede the necessity, at least in many instances, of enforcing, with the same strictness as under the old system, the production of instruments creating or destroying entails at a remote period.

The writer has arrived at the conclusion, until the contrary shall be decided by competent authority, that notwithstanding the abolition of real actions, and the more limited periods prescribed for asserting rights to real property, purchasers will, as a general rule, be entitled to require a title to be shown for sixty years. Particular cases will no doubt occur in which a strict adherence to that rule may be safely dispensed with. Abstracts of title to advowsons must in general be carried back for a century at least. (See *post*, p. 217, note.)

Conditions of sale restrictive of the ordinary rights of purchasers have of late years been carried to an extent which has been deemed by some unreasonable and mischievous. (i) However this may be, such conditions impose upon purchasers the necessity of examining them very carefully before

(i) See 6 Jur. pp. 2, 22.

they become the bidders for or purchasers of property. It has been doubted whether the adoption of special conditions of sale (including mortgagees with a power of sale) is not such a breach of trust as to render a contract for sale under them void in equity. And several conveyancing counsel act upon this doubt, so far as to reject at once titles submitted to them by purchasers under contracts containing objectionable conditions of sale. Every restrictive condition of sale is the admission of a defect *pro tanto*; that is, either of a defect of title or a difficulty in procuring evidence on particular points, and must have a tendency to diminish to some extent the price which a purchaser will give. The compact between the vendor and purchaser amounts to this, that the vendor finds it convenient not to be required to establish by proof every point of title which, in the absence of a special contract, the purchaser would be entitled to require; and the purchaser insures against the risk and the additional expense to be incurred by giving less money. (k) It is observed (2 Hayes Conv. pp. 204, 205), "It is necessary to caution trustees for sale, on the one hand, against imposing, and trustees for investment, on the other, against submitting to unusual conditions, without express authority. Trustees for sale undertake the duty of going to market with the best title which, by ordinary diligence and care in the use of all the means within their power, they are enabled to deduce; and trustees for investment equally undertake the duty of purchasing a sound

(k) See 6 Jur. 22, 23.

and readily negotiable title. There are cases in which a court of equity would require the most unimpeachable title, as where charity funds are to be invested in land. The duty of trustees for sale may be partly inferred from the duty of trustees for investment, for if the latter are not warranted in accepting less than a marketable title, it follows that the former, who having such a title to give, yet offer less, gratuitously exclude a certain class of competitors."

Objections to Title.—One of the conditions of sale provided, that if the purchaser should raise objections to the title, which the vendor should not be able or willing to remove, the vendor should be at liberty to rescind the contract; and that all objections, which should not be taken in writing, within ten days after the delivery of the abstract, should be considered as waived: it was held, that the condition referred to the first delivery of objections; and, if the vendor expressed his willingness to answer them, he could never afterwards rescind the contract. (1)

Where the conditions of sale required that the vendor should deliver an abstract of title within two days after the sale, and that all objections should be taken within twenty-one days after the delivery of the abstract, and the abstract delivered was imperfect, it was held that the time for taking

(1) *Tanner v. Smith*, 10 Sim. 410; and see *Smith v. Tanner*, 2 Scott, N. R. 77.

objections did not begin to run from the delivery of the abstract, because it was imperfect. (m) It was provided by one of the conditions of sale that if any objections to the title were made, and not removed within a certain time, that then, or at any time thereafter, the vendor should be at full liberty, by notice in writing, to annul and put an end to the contract: it was held, that the purchaser having insisted upon a release from certain annuitants, the vendor was at liberty, under this condition, to put an end to the contract. (n)

Errors of Description in Particulars.]—Agreements for the sale of estates, especially if by auction, depend upon the *bona fides* of the transaction; therefore, trifling errors in the description are not material. (o) Where there is a warranty in the particulars relating to a matter not immediately in question, in an action by the vendor for not completing, it must be shown in evidence to have been complied with, although it need not be noticed in the declaration. (p) A condition of sale "that if any mistake shall be made in the description of the premises, or any other error whatever shall appear in the particulars of the property, such mistake or error shall not annul the sale, but a compensation shall be given," &c. does not apply where any substantial part of the property turns out to have no

(m) *Hobson v. Bell*, 3 Jurist, 190; *Glynn v. Bell*, 2 Beav. 17.

(n) *Page v. Adam*, 5 Jur. 793.

(o) *Calcraft v. Rosebuck*, 1 Ves. jun. 221.

(p) *Thompson v. Miles*, 1 Esp. 184.

existence, or cannot be found; or where the vendor has *mala fide* given a very exaggerated description of the property. The purchaser may in such a case rescind the contract *in toto*. (q) A manor was advertised for sale, and described in the particulars and conditions of sale as a manor of which the fines were arbitrary; and it appeared that the fines were arbitrary only on alienation, and that certain fixed payments in the nature of reliefs were made on descents; it was held, that specific performance might be decreed with compensation, the conditions of sale allowing compensation for errors in the description of the property. (r) A condition in articles of sale, that any error in the particulars shall not vitiate the sale, but a compensation shall be made, only applies to cases where the circumstances afford a principle by which the compensation can be estimated. Therefore, on the sale of a reversion, expectant on the death of A. B. without children, an error in the statement of A. B.'s age does not come within the condition, as it would if the reversion were simply expectant on A. B.'s death, because it affects the probability of the other contingency, which is not a subject of calculation, and the purchaser is entitled to rescind the contract. (s) One of the conditions of sale stated that the quantity of a particular lot of the estates sold under a decree was stated from estimation, and that the

(q) *Robinson v. Musgrove*, 2 Mood. & R. 92; see *Wright v. Wilson*, 1 Ib. 207.

(r) *Cuddon v. Cartwright*, 4 Jur. 1180; 4 Y. & Coll. 25.

(s) *Sherwood v. Robins*, M. & M. 194; 3 Carr. & P. 339.

purchaser should not object to complete his purchase, if the quantity should turn out less than was stated; it was held, that the purchaser was not by such condition precluded from his right to compensation in the event of the quantity having turned out to be deficient. (t) A provision in the conditions of sale, that any misstatement in the particular shall not vitiate the sale, does not extend to a misdescription of the situation, wilfully introduced to increase its apparent value. (u) Where it is provided by the conditions of sale by auction, that "if any mistake be made in the description of the premises, or any other material error shall appear in the particulars of sale, such mistake or error shall not annul the sale, but a compensation shall be made," the vendee is not released from his contract by reason of a misdescription in the particulars of sale, obvious on inspection of the premises, unless such misdescription was wilful and designed. (x) For cases in which a certain degree of misdescription was considered immaterial, on the ground of the defect being obvious to the senses of the purchaser, see *Dyer v. Hargrave*, 10 Ves. 505; *Scott v. Hanson*, 1 Sim. 13; 1 Russ. & M. 128. An infringement of the rule, *cujus est solum, ejus est usque ad cælum*, is sufficient to avoid a contract between a vendor and a purchaser. (z)

(t) *Frost v. Brewer*, 3 Jur. 165.

(u) *Duke of Norfolk v. Worthy*, 1 Camp. 340.

(x) *Wright v. Wilson*, 1 M. & Rob. 207.

(z) *Pope v. Garland*, 4 Y. & Coll. 403.

The verbal declarations of an auctioneer at the time of sale will not be received as evidence to contradict the printed particulars; (a) but there may be room for the admission of such evidence, where the purchaser has personal information given him of a mistake in the particulars. (b)

(a) *Gunnis v. Erhart*, 1 H. Bl. 289; see *Jones v. Edney*, 3 Camp. 285; *Bradshaw v. Bennett*, 5 Carr. & P. 48.

(b) 1 Sugd. V. & P. 40, 10th ed.; *Ogilvie v. Foljambe*, 3 Mer. 65; 1 Jac. & W. 639.

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63. All acts of a tenant in tail becoming bankrupt, and which, if he had been seised in fee, would have been void against the assignees, shall be void against any disposition under this act by the commissioner 352

64. Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt, actual tenant in tail, or a bankrupt tenant in tail, entitled to a base fee, shall retain his powers of disposition under the act *ib.*

65. The disposition by the commissioner of the lands of a bankrupt, actual tenant in tail, or of a bankrupt tenant in tail entitled to a base fee, shall, if the bankrupt be dead, have, in the following cases, the same operation as if he were alive; viz.—1. If no protector at the death. 2. If the bankrupt had been

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RECENT STATUTES

RELATING TO

REAL PROPERTY.

PREScription.

2 & 3 WILLIAM IV. c. 71.

An Act for shortening the Time of Prescription in certain cases. [1st August, 1832.]

TIME LIMITED FOR ESTABLISHING RIGHTS OF COMMON AND OTHER PROFIT OR BENEFIT, EXCEPT TITHES AND RENT, FROM LAND.

WHEREAS the expression "Time Immemorial, or Time whereof the Memory of Man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That no claim which may be lawfully made at the common law, by custom, prescription, (a) or grant to any right of common (b) or other profit or benefit, to be taken and enjoyed from or

Claims to right of common and other profits & prebends, not to be defeated after thirty years enjoyment by showing the commencement.

after sixty
years enjoy-
ment the right
to be abso-
lute, unless
had by con-
sent or agree-
ment.

upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. (c)

(a) As to prescription, see *post*, p. 28.

(b) As to rights of common, see *post*, p. 35.

Subjects in-
cluded in first
section.

(c) The several decisions upon this statute, although relating to many different subjects, have for the most part a relation to each other; it seems, therefore, to be the more convenient course to commence with the statute, and the several decisions upon it, rather than to distribute them under the separate heads to which they more immediately relate. The first section relates to such claims as may be lawfully made at common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken or enjoyed from or upon any land (except tithes, rent, and services). It is necessary to bear in mind that the first section includes different subjects from those in the second, which distinguishes between easements and common, or profit à prendre, and that a different limitation is established for the first and latter cases. (*Bailey v. Appleyard*, 8 Ad. & Ell. 167; *Lawson v. Langley*, 4 Ad. & Ell. 890; *Jones v. Richard*, 5 Ad. & Ell. 413.) The right to receive air, light, or water, passing across a neighbour's land, may be claimed as an easement, because the property in them remains common; but the right to take "something out of the soil" is a profit à prendre, and not an easement. (*Manning v. Waddale*, 5 Ad. & Ell. 764; 1 Nev. & P. 172; *Blount*

v. Tregonning, 3 Ad. & Ell. 554; 5 Nev. & M. 308; *Bailey v. Appleyard*, 3 Nev. & P. 257.)

The liberty of fowling has been decided to be a profit *à prendre*. (*Davies' case*, 3 Mod. 246.) The liberty to *prendre* hunt is one species of *encupium*, and the taking of birds by hawks seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish, takes for his own benefit; it is common of fishing. (*Anon.*, Hardr. 407.) The liberty of hunting is open to more question, as it does not of itself import the right to the animal when taken; and if it were a licence given to one individual, either on one occasion, or for a time, or for his life, it would amount only to a mere personal licence of pleasure, to be exercised by the individual licensee. But in the case of a grant by deed, "of free liberty with servants or otherwise to enter lands and there to hunt, hawk, fish, and fowl" to persons, "their heirs and assigns," where it is apparent that not merely the particular individual named, but any to whom they or their heirs choose to assign it should exercise the right, it has been considered that an interest, or *profit à prendre*, was intended to be granted. (Per *Parks, B.*, *Wickham v. Hawker*, 7 Mees. & W. 78, 79.) The right to take sand to manure lands is a profit (*Bleiss v. Tregonning*, 3 Ad. & E. 575.) The 1st section Proof of enjoyment requires in the case of a right of common, or a profit *à prendre*, enjoyment "without interruption for the full period of 30 years;" the most undoubted exercise of enjoyment for 29 years and three quarters will not be sufficient. (*Bailey v. Appleyard*, 8 Ad. & Ell. 164. See *Flight v. Thomas*, 11 Ad. & Ell. 688, *post*, p. 15.) This period of 30 years means next before the commencement of the action. (See *post*, s. 4, and note, p. 13.) Before the passing of this act, a prescriptive claim was a claim of immemorial right; the evidence in support of it was such as a party might be able to give in such a case; and the jury were to draw their inference from such proof as could be produced. Now the burthen of establishing an immemorial right is withdrawn, and the proof is limited to 30 years. But the party prescribing must prove his right for that whole period, and no presumption will be drawn from evidence as to part of that period. (See 8 Ad. & Ell. 167.) The plaintiff prescribed under 2 & 3 Will. 4, c. 71, first for a right of pasture 30 years next before the commencement of the action; and, secondly, for a right of simply turning on cattle for 20 years. No evidence was given of acts of depasturing at a period commencing more than 30 years before the commencement of the suit; but that more than 28 years before the suit (in 1809) a rail was erected, so as to prevent the enjoyment of pasture, and that afterwards, the rail having been removed, the plaintiff depastured for 28 years; it was held that the defendant was not bound to prove that the rail was erected adversely to the plaintiff's right, but that the *onus* lay on the

plaintiff to prove affirmatively his actual enjoyment of pasture for thirty years, and that no presumption could be admitted in his favour on proof of enjoyment for a less period. (*Bailey v. Appleyard*, 8 Ad. & Ell. 161, and note explanatory of case, ib. p. 1; 3 Nev. & Per. 267, note on case; 2 P. & Dav. 1; 2 Jurist, 872.) Also that proof of his enjoyment of pasture for 28 years did not include proof of the right of turning on for 20 years, the latter right being an easement only, a right of a quite different nature, and of which no evidence was given. (*Ib.*) *Littledale, J.*, said it is clear that on the first issue no sufficient proof was given under stat. 2 & 3 Wm. 4, c. 71, s. 1. If the claim had been made by virtue of immemorial user, or of a non-existing grant, as was done before the statute, 28 years' enjoyment would have been some evidence; but the late act, while it dispenses with the necessity of setting up such user or grant, and limits proof to a 30 years' enjoyment, requires that that enjoyment shall be proved to the full extent. Here the 20 years' enjoyment was proved in respect of a right, which, by the statute requires 30 years to confirm it; that is, the right of pasture. The plaintiff therefore was not entitled to recover. (*Bailey v. Appleyard*, 8 Ad. & Ell. 165, 166.)

Plea under
the statute.

If the statute be relied on, it ought to be pleaded. (*Welcome v. Upton*, 6 Mees. & W. 401.) The first section of the statute enacts that no claim to right of common, which shall have been actually enjoyed by any person claiming right thereto, shall be defeated by showing only that it was first taken at some prior time. The 4th section enacts that the 30 years shall be deemed and taken to be the period next before some suit or action wherein the claim shall be brought into question. The 5th section enacts, that in all pleadings in trespass, it shall be sufficient to allege that enjoyment of common as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in the act as may be applicable to the cases, and without claiming in the name of the owner of the fee, as is now usually done. Taking these sections together, it has been decided that the period mentioned in the act is 30 years next before some suit or action, in which the claim shall be brought into question, and that an allegation of an enjoyment for 30 years next before the times when the trespasses to which the plea relates were committed is insufficient. (*Richards v. Fry*, 3 Nev. & P. 67; 2 Jur. 641; *Wright v. Williams*, 1 Mees. & W. 77.) Plea of enjoyment of a right of common for 30 years before the commencement of the suit was held sufficient without saying 30 years next before. (*Jones v. Price*, 3 Bing. N. C. 52.) The proper mode of pleading a profit to be taken out of land, is the enjoyment of the right for the periods mentioned in the first section. (*Welcome v. Upton*, 6 Mees. & W. 398; 7 Dowl. P. C. 475.)

TIME LIMITED AS TO WAYS, EASEMENTS, AND WATER-COURSES.

II. And be it further enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way (d) or other easement, or to any watercourse, (e) or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of *Lancaster* or the Duchy of *Cornwall*, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. (f)

In claims of right of way or other easement the periods to be twenty years and forty years.

(d) As to law of ways, see post.

(e) See note on watercourses, post.

(f) This section relates to claims of rights of way, or other easement, or to any watercourse, or the use of any water to be enjoyed, or derived upon, over, or from any land or water. What included in second section.

A claim, by the occupier of a copper-mine, to sink pits in his own land for the water pumped out of his mine and for the precipitation of the copper contained in such water, and for that purpose to put iron into the said pits, and to cover the same with the said water, and afterwards to let it off, impregnated with metallic substances, into a watercourse flowing over the land of another, is a claim to a watercourse within the second section of the stat. 2 & 3 Will. 4, c. 71. (*Wright v. Williams*, 1 Tyr. & G. 375; 1 Meea. & W. 77.)

Easement.

Easement is the general term for several species of liberties which one man may have in the soil of another, without obtaining any interest in the land itself. (6 Rep. 52; Cro. Car. 419.) Rights of accommodation in another's land, as distinguished from those which are directly profitable, are properly called *easements*. An easement (from the French word *aide*, i. e. *commoditas*) is defined to be a privilege that one neighbour hath by writing or prescription without profit, as a way, or a sink through his land, or such like. (Kitob. 103; Cow. Law Dict. Terms of the Law, tit. Easement; 5 B. & C. 229.)

Different kinds of easements.

There are an infinite number and variety of easements. The following may be enumerated: Rights of way. Right to discharge a stream of water, either in its natural state, or changed in quantity or quality. (*Wright v. Williams*, 1 Mees. & W. 77.) Right to receive a flow of water. Right to discharge rain-water by a spout or projecting eaves. Right to support from the neighbouring wall, or soil. Right to carry on an offensive trade. Right to hang clothes on lines passing over the neighbouring soil. (*Drewel v. Towler*, 3 B. & Ad. 736.) The right of landing nets on another man's ground. (*Gray v. Bond*, 2 Brod. & B. 667.) Right to receive light and air by ancient windows. A right in the occupier of an ancient messuage to water his cattle at a pond, and to take the water thereof for domestic purposes, for the more convenient use of his messuage, is a mere easement, and not a profit *à prendre* in the soil of another. Such a right may be claimed by reason of the occupation of an ancient messuage, without any limitation as to the quantity of water to be taken. (*Manning v. Wasdale*, 1 Nev. & Per. 172; 5 Ad. & Ell. 758 See *Fitch v. Rawling*, 2 H. Bl. 395.) A person may prescribe to an easement in the freehold of another as belonging to some ancient house, or to land, &c. And a way over the land of another, a gateway, watercourse, or washing-place in another's ground, may be claimed by prescription as easements; but a multitude of persons cannot prescribe, though for an easement they may plead custom. (Cro. Jac. 170; 3 Leon. 254; 3 Mod. 294.) In *Goodday v. Michell*, Cro. Eliz. 441, a way to a common fountain is mentioned as an easement claimable for parishioners by custom. The undertakers of a navigation, in whom the soil of the river is not vested, have a mere easement in the land through which it passes. (9 B. & C. 109; *Hollis v. Goldfinch*, 1 B. & C. 205.) The licensee to make a vault in a parish church, and to have the sole and exclusive use of it, is an easement, which cannot be effectually granted without a deed or a faculty, although the incumbent of a living has no power to grant such a right even by deed, but only leave to bury in each particular instance. (*Bryan v. Whistler*, 8 B. & C. 288; 8 C. 2 M. & Ryl. 318.) The right to sit in a pew in a church annexed to a house seems to be an easement. (5 B. & Ald. 361.) A man cannot prescribe to have a necessary easement in the land of another person for himself and his servants to

catch fish in his several fishery. (*Pears v. Lacy*, 4 Mod. 362.) Rent cannot issue out of a mere easement. (*Bassard v. Capel*, 8 B. & C. 141; 2 M. & R. 197; 6 Bing. 150; 3 M. & P. 480; 3 Y. & J. 344.)

The enjoyment of an easement as of right, for 20 years next before the commencement of the suit, within the stat. 2 & 3 Wm 4, c. 71, means a continuous enjoyment as of right, for 20 years next before the commencement of the suit, of the easement as an easement, without interruption acquiesced in for a year. It is therefore defeated by unity of possession during all or part of the 20 years. And such unity of possession need not be specially replied under the 5th section. (*Onley v. Gardiner*, 4 Mees. & W. 496. See *Monmouthshire Canal Company v. Harford*, 1 C. M. & R. 631; 5 Tyr. 85; *Richards v. Fry*, Nev. & P. 367.) To an action of trespass on land, the defendant pleaded, that for twenty, thirty, forty, and sixty years, he and the occupiers of a mill had (as an easement) gone on the land to repair the banks of a stream which flowed to the mill. Replication denying the rights claimed. It appeared that within forty years B. had been lessee of the mill under one landlord, and of land under another: it was held that this was such a unity of possession, as prevented his having an easement on the land. (*Clay v. Thackeray* or *Thackeroy*, 9 Car. & P. 47; 2 M. & Rob. 244.)

It has been decided under this statute, that an enjoyment of 20 years, which cannot give a good title against all having estates in the lands in question, will not confer any title at all, even as between the parties having partial interests under leases. In an action on the case for obstructing a way claimed from a wharf, in a close called *Cliff* meadow, through *Eacham* meadow, over the *locus in quo*, called the *Acre*, where the obstruction took place, into a public highway, it appeared that *Cliff* and *Eacham* meadows were held under the Bishop of *Worcester* by a lease for three lives, granted in 1805. In 1809 *Roberts* purchased the leasehold interest from *Davis*, and began to make bricks in *Cliff* meadow, and carried them through *Eacham* meadow and the *Acre* into the highway. In 1811 *Dalton*, the then occupier of the *Acre*, and the assignee of a copyhold lease for four lives, under the bishop of the close called *Acre*, put up a gate to obstruct *Roberts* in carrying bricks. *Roberts* broke it down, and he and the plaintiff, who claimed under him, continued to carry bricks over the *Acre*, without interruption, for more than 20 years, when the defendant, claiming as assignee of the bishop's lease, under *Dalton*, obstructed the way, and for that obstruction the action was brought. No proof was given on either side, that either of the original leases had been surrendered, and therefore the case was considered as if both had continued to the time of the obstruction. The jury found, first, that they would not presume any grant of right of way by the bishop; and secondly, that the plaintiff *Roberts* had actually enjoyed the way without interruption for more than twenty years, and

Nature of en-
joyment.

The case of
Bright v.
Walker on
the construc-
tion of the
above section.

*Bright v.
Walker.*

the only question was, whether such an enjoyment gave to the plaintiff a right of way over the defendant's close, so as to enable him to maintain the action, which question depended upon the construction of the above act, particularly the second section. *Parke, B.* in giving the judgment of the Court, after stating the second section of the act, said, "In order to establish a right of way, and to bring the case within this section, it must be proved that the claimant has enjoyed for the full period of 20 years, and that he has done so 'as of right,' for that is the form in which, by section 5, (*post*, p. 16,) such a claim must be pleaded, and the like evidence would have been required before this statute, to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly, and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done; if he shall have occasionally asked the permission of the occupier of the land, no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed, 'as of right,' the 'easement,' but the soil itself. So it must have been enjoyed 'without interruption.' Again, such a claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible; and therefore it may be answered by proof of a grant or of a license written or parol for a limited period, comprising the whole or part of the 20 years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. So far the construction of the act is clear, and this enjoyment of 20 years having been uninterrupted, and not defeated on any ground above mentioned, would give a good title; but if the enjoyment take place with the acquiescence or laches of one who is tenant for life only, the question is, what is its effect, according to the true meaning of the statute? Will it be good to give a right against the see, and against those claiming under it by a new lease, or only as against the termor and his assigns during the continuance of the term? or will it be altogether invalid? In the first place, it is quite clear that no right is gained against the bishop; whatever construction is put on the seventh section, (*see post*, p. 24,) it admits of no doubt under the eighth, (*see post*, p. 25.) It is quite certain, that an enjoyment of 40 years instead of 20, under the circumstances of this case, would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period, as against the bishop, it certainly must from the shorter. Therefore, there is no doubt but that possession of 20 years gives no title as against the bishop, and cannot affect the right of the see.

"The important question is, whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title as against the lessee and the defendant claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion on this point; but on the fullest consideration we think that no title at all is gained by a user which does not give a valid title against all, and permanently affect the see. Bright v. Walker.

"Before the statute this possession would indeed have been evidence to support a plea or claim by non existing grant from the termor in the *locus in quo* to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. (See sect. 5, of the act, *post*, p. 16.) But we think that since the statute such a qualified right is not given by an enjoyment for twenty years. For in the first place, the statute is for the shortening the time of *prescription*, and if the periods mentioned in it are to be deemed new times of *prescription* it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial *prescription* are absolute and valid against all. They are such as absolutely bind the fee in the land. In the next place, the statute nowhere contains any intimation that there may be different classes of rights qualified and absolute, valid as to some persons and invalid as to others.

"From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good against any one, and therefore not against the defendant. This view of the case derives confirmation from the 7th section. (See *post*.) This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim to the way) is *tenant for life*; and unless the context makes it necessary for us, in order to avoid some manifest incongruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. That construction does not appear to us to be at variance with any other part of the act, nor lead to any absurdity. During the period of a tenancy for life, the exercise of an easement will not affect the fee; in order to do that, there must be that period of enjoyment against the owner of the fee.

"The conclusion, therefore, at which we have arrived is, that the statute in this case gives no right from the enjoyment that has taken place; and as section 6 forbids a presumption in favour of a claim to be drawn from a less period than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other

by the proof of possession alone. Of course nothing that has been said by the court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or upon proof of its loss by secondary evidence; nor prevent the jury from taking this possession into consideration, with other circumstances, as evidence of a grant, which they may still find to have been made, if they are satisfied that it was made in point of fact." It was therefore decided that the plaintiff was not entitled to recover, and a nonsuit entered. (*Bright v. Walker*, 4 Tyrw. 506, 513; 1 Cr. Mees. & Rosc. 211, 223.)

Evidence of
user.

To support a plea framed on stat. 2 & 3 Will. 4, c. 71, s. 2, of a right of way enjoyed for forty years, evidence may be given of user more than forty years back. If evidence of user beyond forty years were to be excluded, it might be that, after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to the two or three preceding years, and the party might fail because he was unable to carry his case on without going to the distance of forty-one. (*Lawson v. Langley*, 4 Ad. & Ell. 890.)

A plea of forty or twenty years' user, under the stat. 2 & 3 Will. 4, c. 71, ss. 2, 4, is not supported by proof of a user from a period of fifty years before the commencement of the action down to within four years of it; and if the evidence go no further there is no case for the jury. In an action of trespass *quare clausum fregit* the defendant pleaded a right of way for twenty and forty years respectively, under 2 & 3 Will. 4, c. 71, s. 2. Evidence was given of user, in support of these pleas, more than fifty years ago, but there was a failure to show that the user continued for the last four or five years before the commencement of the action. A verdict was found for the plaintiff: on motion for a new trial the rule was refused. (*Parker v. Mitchell*, 3 P. & Dav. 655; 11 Ad. & Ell. 788.)

If there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, yet this may be a sufficient enjoyment of the old right for twenty years to make it indefeasible under the stat. 2 & 3 Will. 4, c. 71, for the agreement to suspend the enjoyment of the right does not extinguish, nor is it inconsistent with the right. (*Payne v. Shelden*, 1 Moody & Rob. 388.) To a plea of forty or twenty years' enjoyment of a way, a license, if it cover the whole time, must be pleaded. (*Tickle v. Brown*, 4 Ad. & Ell. 369.) But a parol or other license, given and acted on during the forty or twenty years, may be proved under a general traverse of the enjoyment as of right; and this, whether such license be granted for a single time of using, or for a definite period. (*Ib.*) It seems, that where issue is joined on the allegation of an interruption acquiesced in, the party alleging the interruption, having proved a non-user during part of the time, may, in order to show that such non-user was not a voluntary forbearance, give evidence that, two years before

the non-user commenced, the party claiming the way paid a consideration for being allowed to use it. (*Id.*)

To an action of trespass *quare clausum frangit*, the defendant pleaded a right of way across the *locus in quo* for the occupiers of B. field, on foot and with cattle and carriages, enjoyed as of right and without interruption for twenty years before the commencement of the suit under the stat. 2 & 3 Will. 4, c. 71. The replication traversed so much of the alleged right of way as was claimed to be used with carriages, and as to the residue of the plea, set forth an act of parliament (The Trent Navigation Act, 23 Geo. 3, c. 48,) under which the Trent Navigation Company, before the commencement of the twenty years, made a halting-path for towing vessels along the river across the *locus in quo* into B. field; that after the commencement of the twenty years, under the powers of another act of parliament (The *Dunham Bridge Act*, 11 Geo. 4, c. 66,) another halting-path was set out nearer to the river, but also across the *locus in quo* and into B. field; and that thereupon the Navigation Company abandoned the former halting-path, which thenceforth ceased to be used as such: that, before and at the commencement of the twenty years, the occupiers of B. field used and enjoyed as of right and without interruption, by virtue and under the provisions of the first act of parliament, a way along the first mentioned halting-path across the *locus in quo* on foot and with cattle, which right of way ceased and determined on the abandonment of that halting-path: but that, from that time until the commencement of the suit, the occupiers of B. field, claiming right to the way as a continuation of the right before enjoyed by them under the act of parliament, continued to use the same way; which way and the use and enjoyment thereof along the halting-path as aforesaid, is the same way and the same use and enjoyment thereof as in the plea mentioned, except as to the user with carriages. It was held, on demurrer, that the replication was good, that it disclosed facts showing that the defendant's user, although as of right and without interruption during the twenty years, within the meaning of 2 & 3 Will. 4, c. 71, ss. 2, 5, was not such as would, before that statute, have been sufficient to prove a claim by prescription or non-existing grant; and that those facts must be replied specially, and could not have been given in evidence under a traverse of the right of way alleged in the plea. (*Kinloch v. Nesile*, 6 Mees. & W. 795.) Alderson B. said, "If a parol permission extends over the whole of the twenty years, the party enjoys the way as of right and without interruption for the twenty years; not so, if the leave given be from time to time within the twenty years. The 5th section creates the difficulty. The act, however, does not alter the nature of the right necessary to give a legal title. The party who avers the right must mean such as could be inferred to exist by custom, prescription, or non-existing grant; and the other party must show, in his answer, that there is no right of that nature. Here the repli-

cation states, that within 20 years before the commencement of the suit, the haling-path was shifted, and the previous one abandoned. If so, according to the act of parliament, the defendant's right to use it ceased. So that the replication shows that the defendant could not have exercised the right either by custom, prescription, or grant, and is therefore sufficient." Leave was given to amend, by pleading that the defendant had enjoyed the right for 40 years. (*Kinloch v. Neville*, 6 Mees. & W. 806.)

It seems that under the 2nd section of 2 & 3 Wm. 4, c. 71, prescription for a right, every year, and at all times of the year, to put and turn the party's cattle into and upon a certain close, is too vague, and may be demurred to. If there be no demurrer, and the issue on such plea be tried, the party prescribing and relying on the 2nd section must give proof applicable to some definite easement. And he will fail if the evidence entitle him not to an easement, but to a profit à prendre. (*Bailey v. Appleyard*, 8 Ad. & Ell. 161.)

LIGHTS.

Claim to the use of light enjoyed for 20 years indefeasible, unless shown to have been by consent.

III. And be it further enacted, That when the access and use of light (g) of, to, and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing. (h)

(g) See note on law of lights post.

Period of enjoyment.

(h) According to this section, a claim to the use of light could not have been established unless it had been actually enjoyed for the full period of 20 years, before the commencement of the action, but if there has been an enjoyment for 19 years and a fraction, and then an interruption takes place, the right may be established at the end of the 20th year, inasmuch, as the interruption, under the 4th section, in order to defeat the 20 years' user, must have been acquiesced in or submitted to for a whole year. (*Flight v. Thomas*, 11 Ad. & Ell. 688; 3 P. & Dav. 442, affirmed by House of Lords, 5 Jur. 811, post, p. 15.)

PERIODS HOW TO BE COMPUTED.

IV. And be it further enacted, That each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made. (i)

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(i) This section is nothing but an exposition of the proof required to establish the right. (*Jones v. Price*, 3 Bing. N. C. 52.) In a plea under the statute 2 & 3 Wm. 4, c. 71, it is sufficient to aver an user of the right for 30, 60, 20 or 40 years, according to the nature of the case, next before the commencement of the suit, and it is not necessary to allege that it has existed for 40 years before the act complained of in the declaration. (*Wright v. Williams*, 1 Tyr. & G. 375; 1 Mees. & W. 77; *Richards v. Fry*, 7 Ad. & Ell. 707.)

Averment as
to enjoyment
before com-
mencement
of suit.

In an action on the case for an injury alleged to be done to the interest of the plaintiff's reversion in certain closes of land, the defendant pleaded an user for forty years before the commencement of the suit. It was objected that they should have averred the user for the allotted period to have taken place before the commission of the act complained of; and in support of this objection, it was argued, that the court could only look upon the facts as they existed at the time the act complained of was committed; that it was absurd to say that the legality of an act must be ascertained, not by the state of things at the time the act was done, but by something that occurs afterwards. "If a literal construction," it was contended, "is to be put on the 4th section of the statute, an enjoyment of 500 years would give no indefeasible right, because the user is required to be during a period 'next before some suit or action, wherein the claim or matter to which such period may relate shall have been or shall be brought in question.' The language of the 2nd section is clear of all doubt. It says expressly that the claim shall not be defeated, where the way or other matter has been actually enjoyed, by any person claiming right thereto, without interruption for the full period, &c. If the computation be of a period before the commencement of a suit, a party might establish his right,

although during the last nine months of the 40 years, there had been an obstruction to which he submitted; for by the 4th section no interruption can be effectual against the user, unless acquiesced in for a year." Lord Abinger, C. B., in delivering the judgment of the court said, "It is said for the plaintiff, that although the act in the 4th section expressly states, that the periods of 20 and 40 years shall be deemed and taken to be next before the commencement of some suit, wherein the claim shall have been brought in question, yet that this enactment must be construed to mean that the period shall be those years next before the act complained of, on account of the absurdities and inconveniences to which a literal construction of this provision would give rise. One of these alleged absurdities and inconveniences was, that no good title could arise to any incorporeal hereditament mentioned in the statute by virtue thereof, unless some action should have been brought by or against the party claiming it; to which may be added that one action could not perfect the title to the right, as the act requires an enjoyment for the full period immediately before any action. Another was, that if the act be so construed, the plea justifying under such a right must be on the face of it absurd, as each of the pleas in question is suggested to be, for each justifies an act done at a particular time by the defendant, as being then lawful, and then done because the defendant actually enjoyed the right of doing the same thing for a period of time afterwards; so that it is said the character of the act, whether it be wrongful or rightful, cannot be known at the time by the party doing it, but depends upon a subsequent event. We are of opinion, however, that it is impossible to construe the act of parliament as intending that the periods of years therein mentioned should terminate at a different time from that fixed in express and positive terms. If the words of the statute were capable of being modified, so as to avoid an inconvenience plainly and manifestly arising from a strict construction of them, we ought to do so; but here the words are precise and unambiguous, and the mischief suggested is perhaps rather apparent than real; and most cases of grants by prescription before the act passed were of the same nature, and the validity of rights gained by them depended much upon the mode of enjoyment, until that action was brought in which they came in question; and with respect to the form of the plea, which is at first sight somewhat incongruous, it is to be observed that there is something of the same kind of incongruity, though by no means to the same extent, in the usual mode of pleading a prescription, which states 'that some person seised in fee from time whereof the memory of man is not to the contrary, until and at the time when &c., and from thence hitherto hath had and enjoyed, and hath been used and accustomed to have and enjoy, and still ought of right to have and enjoy,' a particular easement, and then justifies the act done by reason of that enjoyment, which enjoyment is both

before and after the time of such act. It appears to us, that the statute in question intended to confer, after the periods of enjoyment therein mentioned, a right from their first commencement, and to legalise every act done in the exercise of the right during their continuance." The court held the pleas sufficient in point of law.) (*Wright v. Williams*, 1 Mees. & W. 77, 98—100. See *King v. Inhabitants of Caley*, 3 Maule & S. 22.)

Interruption means an obstruction by the owner of the *locus in quo*, but it is to amount to nothing unless acquiesced in for what a year. (*Osley v. Gardiner*, 4 Mees. & W. 497.)

When an easement has been enjoyed for 19 years and a fraction and is then interrupted by the owner of the soil, the easement may still be acquired under stat. 2 & 3 Wm. 4, c. 71 at the end of the 20th year, for the interruption to defeat 20 years' user must have been acquiesced in or submitted to for a whole year. In an action for obstructing certain windows, in a house occupied by the plaintiff, it appeared that at the time when a wall which caused the obstruction was erected, the part of a window had existed and been enjoyed, and the use of the light and air through the same had been enjoyed for the space of 19 years and 330 days only, the period of a year had not elapsed from the time of the erecting the wall until the commencement of the action in which the right had been brought into question. The plaintiff had notice of the erection and of the prevention of the light and air from entering thereby through the said part of the window, and at the time of the commencement of the action, the part of the window had been made, and had existed and been enjoyed, and the access and use of light and air through the part of the window had been enjoyed for the full space of 20 years, except as aforesaid, without any interruption, except the interruption above-mentioned, and not under any consent or agreement given by deed or writing; and at the time of the commencement of the action such interruption had not been acquiesced in for one year after the plaintiff had notice thereof. If the 3rd section had stood alone, the court held that the plaintiff below could not have established any claim to the use of the light in question, because it had not been actually enjoyed with the message for the full period of 20 years before the commencement of the action, but only for 19 years and 330 days, when the enjoyment was interrupted by the erection of the wall. The 4th section, however, defines the meaning of the word *interruption*, and as upon the trial it was proved that the erection of the wall, which was the act complained of, had not been acquiesced in for one year after notice, inasmuch as the action was commenced within a few months after the erection of the wall, the court was of opinion that such erection of the wall and continuing it so erected, was not an interruption within the meaning of the 4th section of the act. (*Flight v. Thomas*, 11 Ad. & Ell. 688; 3 P. & Dav. 442, affirmed by the House of Lords, 6 Jurist, 811.)

Interruption
by natural
cause.

Where it appeared that at a period much earlier than 20 years before the commencement of the action, the stream had flowed through the plaintiff's lands; but that there had been some interruption about 22 years before the action, and it was not till within 19 years that the stream had again flowed constantly in its former course, and it was objected that there was a want of sufficient evidence to support the plaintiff's claim, *Tindal, C. J.*, said, it would be very dangerous to hold, that a party should lose his right in consequence of such an interruption; if such were the rule, the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment. (*Hall v. Swift*, 4 Bing. N. C. 381; 6 Scott, 167.)

Right not dis-
proved by in-
terruption.

To an action of trespass for taking the plaintiff's cattle in an open field, called P. and G. field, and impounding them, the defendant pleaded, 1st, that T. B. and his ancestors had been immemorially used and accustomed to have for themselves, and their heirs and assigns, the sole and several pasturage in 217 acres of P. and G. field in gross for all his and their cattle, from the 4th September to the 5th April; that T. B., in 1755, by indenture granted the said pasturage to S. B., his heirs and assigns for ever; that J. B. (who claimed by descent from S. B.), in 1836, demised the said pasturage to the defendant, who seized the plaintiff's cattle because they were depasturing on the said 217 acres. The second plea alleged a right of sole pasturage in gross for thirty years before the commencement of the suit (under the stat. 2 & 3 Will. 4, c. 71, s. 1), in J. B. and his ancestors, and a demise from him to the defendant, concluding as in the first plea. The replication traversed the right of T. B., as alleged in the 1st plea, and the enjoyment of J. B. as of right, without interruption, for 30 years as alleged in the second. It appeared in evidence, that within the last twenty years encroachments had been made by buildings and inclosures on the 217 acres, and that above 30 acres had been thus appropriated, but no encroachments had been made on the part of the 217 acres, on which the alleged trespass was committed: it was held, that these interruptions, being so recent, did not disprove the right of T. B. to the pasturage in 1755, as alleged in the 1st plea; and that not having been made on that part of the land where the plaintiff's cattle were depasturing, they were not conclusive evidence of an interruption of the enjoyment of that part by J. B., as alleged in the 2nd plea. (*Welcome v. Upton*, 6 Mee. & W. 536.)

PLEADINGS.

In actions on
the case the
claimant may
allege his

V. And be it further enacted, That in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right

generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation (k).

right generally as before this act.

It is a plea to trespass and other pleadings, where party need to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied specially.

(k) The words "enjoyed by any person claiming right," applied to easements in 2 & 3 Will. 4, c. 71, s. 2, and "enjoyment thereof as of right," in s. 5, mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave at the time by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract, or license, in case of a plea for twenty years. (*Tickle v. Brown*, 4 Ad. & Ell. 369; 6 Nev. & M. 230. See *Bright v. Walker*, 1 Cr. M. & R. 219; ante, p. 8; *Arkwright v. Gell*, 5 Mees. & W. 333.)

Meaning of words "claiming right," and "as of right."

When license must be replied specially. It has been decided upon this section, that where a defendant justifies under an enjoyment of twenty or forty years, if the plaintiff relies upon a license covering the whole of that period, he must reply such license specially: but a license granted and acted on during the period may be given in evidence under the general traverse of the enjoyment "during the period alleged, showing that there was not, at the time when the agreement was made, an enjoyment as of right;" and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years. (*Tickle v. Brown*, 4 Ad. & Ell. 369; 6 Nev. & M. 230.)

As to license. To a declaration in trespass *qu. el. fr.* the defendant pleaded, that he and the former occupiers of a house and land had for twenty years used and enjoyed as of right a certain way on foot and with horses, &c., from and out of a common highway, towards, into, through, and over the plaintiff's close, to the defendant's house and lands and back, at all times of the year, at their free will and pleasure. The replication averred, that the defendant, &c. used and enjoyed the right of way mentioned in the plea, but they did so under the plaintiff's leave and license. At the trial, it appeared that the defendant and the former occupiers of his house and land had an admitted right of way from thence over the *locus in quo* to the highway, and across the highway to a close called Reddings, and that for the last twenty years they had a license from the plaintiff to use, whenever they pleased, a way from the defendant's house and lands over the *locus in quo* to the highway and back, when they had not any intention of going to Reddings. It was held, that the replication was not supported by this evidence, and that the plaintiff was bound to show a license co-extensive with the right claimed in the plea and admitted by the replication. (*Colchester v. Roberts*, 4 Mee. & W. 769.)

The asking leave from time to time *within* the forty or twenty years, breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right; and therefore the evidence of such asking *within* the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right. (*Monmouthshire Canal Co. v. Harford*, 1 Cr. M. & R. 614. See *Tickle v. Brown*, 4. Ad. & Ell. 383.) Lord Denman, C. J., said, that in looking at the report of the case of the *Monmouthshire Canal Company v. Harford*, (1 Cr. M. & R. 614; 5 Tyr. 68; post, p. 27,) we find that the decision rests on this ground, viz. that the asking leave from time to time *within* the forty or twenty years breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right: and therefore the evidence of such asking *within* the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right. To this ground of decision we quite accede; and it will follow that, not only an asking leave, but an agreement *commencing within*

Ground of decision, *Monmouthshire Canal v. Harford*.

the period may be given in evidence under the general traverse, notwithstanding the words of the fifth section; for the party cannot and does not rely on it as an answer to an enjoyment as of right which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement; but as showing that there was not, at the time when the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years. (*Tickle v. Brown*, 4 Ad. & El. 383, 384.) In *Beasley v. Clark* (3 Scott, 258; 2 Bing. N. C. 709), *Tindal, C. J.*, said, "Under a replication denying that the defendant had used the way for forty years as of right, and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time—as, that it was used by stealth, and in the absence of the occupier of the close, and without his knowledge; or that it was merely a precarious enjoyment by leave and license, or any other circumstances which negative that it was an user or enjoyment under a claim of right; the words of the fifth section, not being inconsistent with the simple fact of enjoyment, being referable, as we understand the statute, to the fact of enjoyment as before stated in the act, viz., an enjoyment claimed and exercised as of right." In *Osley v. Cardiner*, 4 Mees. & W. 494, it was decided that unity of possession was "inconsistent with the simple fact of enjoyment as of right," and therefore need not be specially pleaded. The simple fact of enjoyment referred to in the fifth section is an enjoyment "as of right," and proof that there was an occasional unity of possession is as much in denial of that allegation, as the occasionally asking permission would be. In trespass, upon issue joined, whether the defendant had for thirty years enjoyed as of right a certain privilege, &c., upon the plaintiff's land, the plaintiff, in order to raise the presumption that the enjoyment was permissive, may give in evidence an old lease made to the defendant's predecessor, and expiring immediately before the commencement of the thirty years, whereby the lessee was entitled to the privilege, &c., during the term. It is not necessary in such a case for the plaintiff to reply the lease specially under 2 & 3 Will. 4, c. 71, s. 5. (*Clay v. Thackeray* or *Thackeray*, 2 M. & Rob. 244; 9 Carr. & P. 47; ante, p. 7.) In an action of trespass *quare clausum fregit*, it was also held that this unity of possession need not be specially replied; and that, without a special replication under the 2 & 3 Will. 4, c. 7, s. 5, the lease of the land to B., and letters written by B. while lessee of the mill, and before he became lessee of the land, were receivable in evidence. (*Ib.*) And it was held that B.'s lease of the land having expired more than thirty years ago, the acts of the occupiers of the mill in repairing the banks ever since that time, without any leave asked by them, or any notice from the other side of any adverse claim, must be taken to be done as of right. (*Ib.*)

Nature of
right.

The plea under 2 & 3 Will. 4, c. 71, was of a right of way for the occupiers of a close for twenty years, for horses, carts, waggons, and carriages, at their free will and pleasure. The replication traversed such right. It was held, that, under the issue, the plaintiff might show that the defendant had a right of way for horses, carts, waggons, and carriages, for certain purposes only, and not for all, and was not compelled to new assign; and might show that the purpose for which the defendant had used the road, and in respect of which the action was brought, was not one of those to which the right extended. (*Cowling v. Higginson*, 4 Mee. & W. 245.)

Whether
common in
gross within
act.

The latter part of the fifth section in express terms applies only to rights which can be claimed by the occupiers of a tenement in respect of it, which, it has been contended, is confined to a claim appendant or appurtenant, and does not apply to a right in gross, as a right to take the whole pasturage in gross. (See 5 Mee. & W. 402; 6 Mee. & W. 540; 7 Mee. & W. 81.) It is questionable whether a right of common in gross be within the stat. 2 & 3 Will. 4, c. 71. *Perke*, B., said, "If the only question had been whether a right of common in gross be within the stat. 2 & 3 Will. 4, c. 71, s. 5, we should probably have granted a rule for the purpose of giving that question further consideration, although we might be disposed to think that the present case is within the equity of the statute. (*Welcome v. Upton*, 6 Mee. & W. 542. See S. C. 5 Mee. & W. 404.)

Proof of pre-
scription.

In cases of prescription, the allegation must be proved as laid. Thus, in replevin, if the defendant avow taking the cattle as damage feasant, and the plaintiff plead in bar a right of common, and aver that the cattle were levant and couchant, on which averment issue is joined, proof only for part of the cattle will not be sufficient, for the issue is upon the whole; (2 Roll. Abr. 706; 5 Rep. 79; 4 Rep. 29 b; 1 Campb. 313. See 2 H. Bl. 224.) But though a party must prove a prescriptive right commensurate with the right claimed, he will not be precluded from recovering, because he proves a more ample right than what he claims. Evidence of a right of common for sheep and cows will support a plea prescribing for common only for sheep. (Cro. Eliz. 722; 1 Taunt. 142; *West v. Andrews*, 1 B. & Cr. 77.) A party may prescribe for less than he proves, but that implies that the lesser right claimed is included in the greater. (*Bailey v. Appleyard*, 8 Ad. & Ell. 167.) Where a plaintiff claimed a right of common for all his commonable cattle, and the proof was that he had turned on all cattle that he kept, but he had never kept any sheep; it was held that such evidence of a right for all commonable cattle ought to have been left to the consideration of the jury. (*Manifold v. Pennington and others*, 4 B. & Cr. 161.) Where in debt, for not setting out tithe of hay, plaintiff averred that there was a certain annual custom as to setting out the tithe "within the parish, and the limits, bounds and tithable places thereof;" it was held, that such averment was proved, for that the custom pre-

vailed in all parts of the parish where tithe of hay was set out, and that proof of a modus for hay in one township made no difference. (*Pigott v. Bayley*, 6 B. & Cr. 16.) Where a plaintiff claimed an easement of hanging linen across a yard for drying them larger than that proved, the court refused to allow the plaintiff to amend, on payment of costs, inasmuch as he was not thereby precluded from bringing another action, if he were interrupted in the enjoyment of the limited right. (*Drewell v. Towler*, 3 B. & Ad. 735.) The general rule of pleading in cases of tort is, that it is sufficient if part only of the allegation stated in the declaration be proved, provided that what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved. There is an exception, however, to this rule, which is, where the allegation contains matter of description. There, if the proof given be different from the statement, the variance is fatal. (*Ricketts v. Sawney*, 2 B. & Ald. 363.)

By stat. 3 & 4 Wm. 4, c. 42, s. 23, the court, in a trial of a civil action, may cause the record to be amended when any variance shall appear between the proof and the recital, or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name or other matter, in any particulars not material to the merits of the case, and by which the opposite party cannot have been prejudiced. This section contains provisions as to payment of costs, and postponing the trial, and the party dissatisfied with such amendment may apply to the court whence such record or writ issued for a new trial upon that ground, and if the court above shall think the amendment improper, a new trial may be granted. This statute, it is conceived, will apply to such a case as the following: where the declaration alleged a prescriptive right of fishing over four places in a navigable river, and the right proved was over three only, the variance was held fatal. (*Rogers v. Allen*, 1 Campb. 314.) Where, in a declaration in case for diverting a stream, the plaintiff entitled himself to the water as owner of a mill, and it appeared in evidence that he was entitled only as owner of land, the court refused to amend the declaration by adapting it to the proof. And the court refused to give judgment for the plaintiff upon an indorsement of the facts upon the *postea*, under 3 & 4 Wm. 4, c. 42. (*Frankum v. Earl of Falmouth*, 4 Nev. & Man. 330; 2 Ad. & Ell. 452; 1 Har. & Wol. 1.)

Amendments
in cases of
variances.

By the rules made in Hilary term, 4 Wm. 4, 1834, in pursuance of the statute 3 & 4 Wm. 4, c. 42, since sanctioned by parliament, it is (amongst other things) ordered, that in trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there; pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed.

New rules of
pleading.

But pleas of common at all times of the year, and of such

right at particular times, or in a qualified manner, are not to be allowed. So pleas of a right of way over the *locus in quo*, varying the *termini* or the purposes, are not to be allowed. (R. G. H. T. 4 Will. 4; 2 Cr. & Mees. 14, 15; 3 Nev. & Mann. 4.)

Effect of not guilty.

In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *Ex. gr.* In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, the plea of not guilty will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

In actions of trespass *quare clausum fregit*, the close or place in which, &c., must be designated in the declaration by name or abutments, or other description, in failure whereof the defendant may demur.

In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession, of that place, which, if intended to be denied, must be traversed specially. (R. G. H. T. 4 Will. 4.) Under this rule "not guilty," pleaded to a declaration in case, for the wrongful diversion of water from the plaintiff's mill, puts in issue the mere fact of the diversion and not its wrongful character. Therefore where the fact of the diversion was proved, but the plaintiff failed to show his right to the water, the court ordered the verdict which had been entered for the defendant on the issue "not guilty," to be set aside, and a verdict to be entered for the plaintiff, but without damages. (*Frankum v. The Earl of Falmouth*, 4 Nev. & Mann. 330; 2 Ad. & Ell. 452; 1 Har. & Wol. 1.) In an action on the case for a nuisance, the plea of not guilty puts in issue the fact of nuisance, and that the defendant caused it. (*Dawson v. Moors*, 6 Carr. & P. 25.) In *Dukes v. Gosling*, 1 Bing. N.C. 452; 4 Nev. & M. 330, in an action for disturbing a right of way, it was held that the plea of not guilty put in issue the fact of obstruction only, and admitted the inducement as stated in the declaration. If the defendant relies upon the loss of the easement, for the disturbance of which the action is brought, by the plaintiff's non-user, such non-user must be pleaded according to its legal effect. (*Manning v. Waddale*, 5 Ad. & Ell. 756.)

Right of way.

Where in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages and cattle and

on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant, in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff, in respect of such of the trespasses as shall not be so justified. (R. G. H. T. 4 Will. 4.)

In trespass *quare clausum fregit*, issues were joined on three pleas: 1st, of a public carriage way; 2dly, of a public bridle way; 3dly, of a public footway. The jury found a verdict for the plaintiff on the 1st issue, and for the defendant on the 3rd; and the judge without the consent of the plaintiff discharged the jury from giving a verdict on the 2nd issue. The court granted a new trial, although the plaintiff at the beginning of the trial had agreed that the damages, if any, should be merely nominal. (*Tinkler v. Rowland*, 4 Ad. & El. 868.)

And where, in an action of trespass *quare clausum fregit*, Common of the defendant pleads a right of common of pasture for divers pasture. kinds of cattle, *ex. gr.* horses, sheep, oxen, and cows, and issue is taken thereon; if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified. (R. G. H. T. 4 Will. 4.)

To a declaration in trespass for breaking and entering two closes of the plaintiff, the defendant pleaded that the said closes were from time immemorial parcels of a waste, and that he the defendant had a prescriptive right of common in the waste, and because the closes were wrongfully separated from the residue of the waste, he broke down the gates. Replication, that the said closes were not wrongfully separated from the residue of the waste, but continually for 20 years and more, and before the first time when, &c. had been and were separated and divided and inclosed from the residue of the waste, and occupied and enjoyed during that time in severalty. The rejoinder traversed this averment, and issue was joined thereon. It was held, that the allegation in the replication, that "the said closes had been inclosed from the residue of the waste, and enjoyed in severalty," was divisible, and satisfied by proof that any part of the closes in which the trespasses were committed had been so inclosed for that period, and that the plaintiff might therefore recover *pro tanto*. (*Tapley v. Wainwright*, 5 B. & Ad. 395.)

And in all actions in which such right of way or common as Similar plea. aforesaid, or other similar right, is so pleaded, as the allegation as to the extent of the right are capable of being construed distributively, they shall be taken distributively. (R. G. H. T. 4 Will. 4; 2 Cr. & Mees. 22—24; 3 Nev. & Mann. 9, 10.)

This applies to the case of a trespass committed on three Right of way.

closes, where no evidence of title was given as to one of them, (*Phythian v. White*, 1 Mees. & W. 216); and to a claim of right to pass and repass for the purpose of carrying water and goods, when the jury found for the defendant as to the former, but negated the latter right, (*Knight v. Moore*, 3 Scott, 326; 3 Bing. N. C. 296); but not to a case where on issue joined on a plea of right of way with carts, carriages, horses, and on foot over the *locus in quo*, the jury found that the defendant had a right of way for the purpose of carting timber only. (*Higham v. Rabbit*, 7 Scott, 827; 5 Bing. N. C. 623; 7 Dowl. P. C. 653; 3 Jur. 558.) To a declaration in trespass *quare clausum fregit*, defendant pleaded a right of way in the close in which, &c.; plaintiff new assigned extra the way in the plea mentioned, to which defendant pleaded that plaintiff obstructed the way in the plea mentioned, wherefore defendant deviated; plaintiff replied *de injuria*. It was held, that on this record plaintiff was entitled to apply the evidence to a way across the close, which he admitted, and which had not been obstructed, and that defendant could not prove his case by showing that another way which he claimed across the close, which was disputed by the plaintiff, had been obstructed. A judge should not, even by consent of parties, allow an issue to be tried which the record does not properly raise, unless the parties will amend the pleadings. Per *Patteson, J.* at nisi prius. (*Ellison v. Isles*, 11 Ad. & Ell. 665.)

LESS PERIOD NOT TO BE ALLOWED.

Restricting the presumption to be allowed in support of claims herein provided for.

VI. And be it further enacted, That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim. (1)

(1) This section forbids a presumption in favor of a claim to be drawn from a less period of enjoyment than that prescribed by the statute. (*Bright v. Walker*, 1 Cr. M. & Rosc. 222; *ante*, p. 7—10.)

DISABILITIES.

Proviso for persons under disabilities.

VII. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall

have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods herein-before mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible. (m)

(m) It is the intention of the act, that an enjoyment of thirty years or twenty years shall be of no avail against an idiot or other person laboring under incapacity, but that one of sixty or forty years shall confer an absolute title, even against parties under disabilities. See *Wright v. Williams*, 1 Tyr. & Gr. 392; 1 Mees. & W. 77.) This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim) is tenant for life. During the period of a tenancy for life, the exercise of an easement will not affect the fee, in order to do that, there must be that period of enjoyment against an owner of the fee. (*Bright v. Walker*, 1 Cr. M. & R. 222; ante, pp. 7, 10.) By the 1st section, where the right, profit, or benefit shall have been taken as required for the full period of sixty years, the right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing. By the 2nd section, where any way or easement, or any watercourse, or the use of any water shall have been enjoyed as therein mentioned for the full period of forty years, the right thereto is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. By the 3rd section, the enjoyment of light for the full period of twenty years without interruption is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

TIME EXCLUDED FROM FORTY YEARS.

VIII. Provided always, and be it further enacted, that when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoy-

What time to be excluded in computing the term of forty years appointed by this act.

ment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof. (n)

(n) According to the 7th section a tenancy for life is included in the period of forty years, the 8th section only takes it out on condition that the reversioner shall bring his action within three years after its determination; an user of forty years confers a *prima facie* title, which is good, unless the reversioner pursues his remedy within the three years. (*Wright v. Williams*, 1 Tyr. & G. 393; 1 Mees. & W. 77.) The effect of the 8th section is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment, which is necessary to give a right, by so long a time as the land is out on lease, subject to the condition therein mentioned. (*Onley v. Gardiner*, 4 Mees. & W. 500.)

Replication of
life estate.

Where a replication to a plea of enjoyment of an easement for forty years, under the 2 & 3 Will. 4, c. 71, sets up a life estate in order to bring the case within the 8th section of the act, it must show that the plaintiff is the party entitled to the reversion expectant upon such life estate. In an action on the case for an injury alleged to be done to the interest of the plaintiff's reversion in certain closes of land by turning water into a channel running through the plaintiff's lands, after such water had been used by the defendant on his own land, in precipitating minerals, and become so impregnated as to be extremely injurious to the plaintiff's estate; the defendant pleaded an user for forty years "before the commencement of the suit." The replication set forth, that Rice Thomas was seised in his demesne as of fee of the several closes over which the watercourse passed, and that by certain indentures of lease and release therein stated, his interest was conveyed to trustees for the uses therein mentioned, and one of which was to the use of Rice Thomas for life, with a power to Rice Thomas, whilst so seised of the freehold for his life to grant leases upon certain conditions therein named, by indenture; that Rice Thomas, by virtue of this settlement, did become seised of the freehold for his life; and that whilst he was so seised, by virtue of the power therein contained, he did, by indenture duly made between himself of the one part, and Edward Hughes and Thomas Williams of the other part, enfeoff the said Hughes and Williams of the said closes for and during the term of the lives of William Lewis Hughes, now Lord Dinorben, Owen Williams, and John Davies, and the longest liver of them; and the replication concluded by stating, that Lord Dinorben, one of the lives, was still in being. It was said by the

court, "the enjoyment of the right during forty years alleged in the pleas, being admitted, the replications, which state only an existing tenancy for life, are no answer; for the time of a tenancy for life in a person who might otherwise be capable of resisting the claim, though excluded by the 7th section from the computation of the shorter period of twenty years absolutely, is, by the 8th section, excluded from the computation of the longer period of forty years conditionally only; that is, provided the reversioner expectant on the determination of the term for life shall, within three years (that is, probably, before the end of three years) after such determination, resist the right: and it does not appear that the plaintiff is entitled to the reversion expectant on that lease, though it is averred that he has a reversion expectant on the determination of the interest of the tenant in possession. The tenancy for the life of Lord Dinorben, the *cestui que vie*, is therefore not to be excluded, on these pleadings, from the period of forty years; and such period being complete, the defendant is entitled to an indefeasible right to the easement claimed. (*Wright v. Williams*, 1 Mees. & W. 100).

Upon an issue with regard to twenty years' enjoyment of a License. railroad, without interruption, for the convenient use and occupation of their closes, the defendants insisting upon such a right are bound to show an uninterrupted enjoyment as of right during that period, and the plaintiffs may prove under such issue applications by the defendants during the twenty years for leave to cross their railroad, and it is not necessary for them to reply such license specially under 2 & 3 Will. 4, c. 71, s. 8. Where the simple issue is, whether there has been a continued enjoyment of the way for twenty years, any evidence negating the continuance is admissible. Every time that the occupiers asked for leave they admitted that the former license had expired, and that the continuance of the enjoyment was broken. (*Monmouthshire Canal Company v. Barford*, 1 Cr. M. & R. 615; *ante*, p. 18.)

The words of the 2d section extend to all easements; but the word "easement" is omitted in the 8th section. There seems reason for thinking that the word *convenient* has crept into the 8th section instead of the word "easement," for, with that exception, the expressions in the two sections are the same. It does not appear why it should be supposed that the legislature would have neglected to protect the interests of reversioners in the case of other easements than ways and watercourses. (See *Wright v. Williams*, 1 Tyr. & G. 390; 1 Mees. & W. 77.)

Omission of easements in 8th section.

IX. And be it further enacted, that this act shall not extend to *Scotland or Ireland*.

Not to extend to Scotland or Ireland. Commencement of act.

X. And be it further enacted, that this act shall commence and take effect on the first day of *Michaelmas* term now next ensuing.

OF SUBJECTS INCLUDED IN THE PRESCRIPTION ACT.

1. *Of the Nature of Prescription.*
2. *Of Rights of Common.*
3. *Of the Presumption of Grants of Easements.*
4. *Of Rights of Way.*
5. *Of Watercourses.*
6. *Of the Right to Pews.*
7. *Of the Right to Light and Air.*

1. OF THE NATURE OF PRESCRIPTION.

Nature of
prescription.

Every species of prescription by which property is acquired or lost, is founded on this presumption, that he who has a quiet and uninterrupted possession of any thing for a certain number of years, is supposed to have a just right, without which he would not have been suffered to continue in the enjoyment of it; for a long possession may be considered as a better title than can commonly be produced, as it supposes an acquiescence in all other claimants, and that acquiescence also supposes some reason for which the claim was forborne. (1 Domat, 461). The most ancient and distinguished writers on the common law of England have recognized the principle, that a right to any incorporeal hereditament may be acquired by length of time. This mode of acquisition they have denominated *prescription*, "*prescriptio est titulus ex usu et tempore substantiam capiens ab auctoritate legis.*" (Co. Litt. 113 b). Every prescription supposes a grant once made, and afterwards lost, and therefore nothing can be claimed by prescription which in its nature could not have been granted. To constitute a prescription previously to this act, the enjoyment must have existed time out of mind, or, in other words, must have commenced antecedent to the reign of Richard I. (Bract. L. 2, c. 22; 3 Lev. 160; 1 Bl. Comm. 75; 2 Id. 263). The period called *legal memory*, in contradistinction to living memory, commenced in 1189. (Co. Litt. 114 b; 2 Inst. 238; 2 Ves. sen. 511.) But in order to make persons on the alert in guarding their rights, and to prevent disputes respecting rights which have been long and peaceably enjoyed, the courts have interpreted an enjoyment of an incorporeal right for the period of forty years, or even twenty years, unless rebutted by other circumstances, *presumptive evidence* that the right has existed time out of mind, and consequently (unless its origin could be proved) a sufficient foundation for establishing a prescriptive right. (10 East, 476; 2 Brod. & Bing. 403; Cowp. 215; 3 Wils. 23). And accordingly a regular usage for twenty years, not explained nor contradicted, was that upon which many public and private rights were held, and where there was nothing to contravene, public policy was sufficient to establish a custom. (*Res v.*

Joliffe, 2 B. & Cr. 54; 6 East, 214; 2 Wms. Saund. 175, a., d). But since the statute 2 & 3 Wm. 4, c. 71, a title to subjects included in the first section of that act cannot be established by an enjoyment for a less period than thirty years, *ante*, pp. 1, 3. It is a general rule, that customs are not to be enlarged beyond the usage, because it is the usage and practice that make the law in such cases, and not the reason of the thing. (11 Mod. 160; Fitzgib. 243). An usage for inhabitants to have common to their houses was held not to extend to a *new* house. (Owen, 4). To every prescription there were two inseparable incidents—time and usage. (Co. Litt. 113). Prescription, and time whereof no memory runneth to the contrary, were all one in law. (Litt. s. 170). And this was understood not only of the memory of any one living, but also of proof by any record or writing, or otherwise to the contrary, which was considered within memory. (Co. Litt. 115 a). Thus a lease of ground for fifty-six years to be a passage, negatived a prescription, and suffering it to be used for three or four years after the expiration of the lease was held not to amount to a gift to the public. (*Rex v. Hudson*, Str. 909). A prescription ought to be certain; therefore a custom or prescription for copyholders to pay to the lord for a fine upon death *two years rent or less* is bad. (Com. Dig. Prescription (E.3)). And a prescription ought to be reasonable; and therefore a man cannot prescribe for an heriot upon the death of every stranger within his manor. (Id. (E.4)). But it may be reasonable, although unusual or inconvenient, as for a way over a church-yard, or through a church. (2 Roll. 266, l. 40).

A right by prescription to incorporeal hereditaments is founded on immemorial usage, as where a person shows no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it. Such a prescription differs from custom in this respect, that a custom is properly a local usage, not annexed to the person,—such as the custom that all the copyholders of a manor have common of pasture upon a particular waste; whereas prescription is always annexed to a particular person. (Co. Litt. 113 b; 4 Rep. 31 b.) This kind of prescription is of two sorts,—either a personal right, which has been exercised by a man and his ancestors; or a right attached to the ownership of a particular estate, and only exercisable by those who are seised of the estate. The first is termed a prescription in the person; the second is called a prescription in a *que estate*, which in plain English means a right or privilege claimed by prescription as annexed to and going along with particular lands. (Co. Litt. 113 b, 121 a; 3 Gwill. 1291.)

Before the passing of the 2 & 3 Will. 4, c. 71, a prescription in a *que estate* must always have been laid in the person who was seised of the fee simple. A tenant for life, for years, or at will, or a copyholder, could not prescribe in this manner, by reason of the imbecility of their estates; for as prescription

Difference between custom and prescription.

was deemed to be always beyond time of memory, it would have been absurd that those whose estates commenced within the memory of man should have prescribed for any thing. Therefore, a tenant for life must have prescribed under cover of the tenant in fee simple, and a copyholder under cover of his lord. (6 Rep. 60 a; Fortesc. 340.) The uniform practice, in a plea justifying under a right of common, was to set out the title to the common specially, by showing a seisin in fee of the land to which the defendant claimed a right of common, either in himself or in some other under whom he derived title, and then to prescribe in the *que estate* for the right of common, by showing the right to have been in the party seised in fee, and all those whose estate he had in the land from time immemorial. (*Grimstead v. Marlow*, 4 T. R. 718; 1 Wms. Saund. 346. (n. l.)) And if the defendant was lessee for years, he must have shown the seisin in his lessor, and prescribed in him; for if he laid the prescription in himself it was bad. (Cro. Car. 699; 4 Rep. 38.) As where a defendant justified under a right of common of pasture, showing a demise from a freeholder for life of the land in respect of which he claimed, and averred that he the defendant, and all those whose estate he then had, and his landlord, from time, &c. had common of pasture in respect of the demised premises, it was held upon demurrer to be a bad plea. (*Atty. Gen. v. Gauntlett*, 3 Y. & Jer. 93.) But by the fifth section of the act, (*ante*, p. 16,) in actions on the case, the claimant may allege his right generally; and in pleading to actions of trespass, where previously it would have been necessary to have alleged the right to have existed from time immemorial, it will be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed during the period provided by the act, and without claiming in the name of the owner of the fee.

A profit claimed out of another man's soil must be alleged by way of prescription, and not by way of custom, for a custom to take a profit in *alieno solo* is bad (*Blewitt v. Tregonning*, 3 Ad. & El. 575), but an easement, as a right of way in *alieno solo*, may be claimed by custom. (*Grimstead v. Marlow*, 4 T. R. 717.) The same rights may be claimed either by custom or prescription. One is local, the other personal; and the difference lies in the mode of claim suited to the difference of the claimants. Where the claimant has a weak and temporary estate, he cannot claim in his own right, but must have recourse either to the place, and allege a custom there, or if he prescribes in the *que estate*, it must be under cover of the tenant in fee. The case of copyholders claiming common by custom is a strong instance. So occupiers of houses may set up a custom to cut turves. (*Benn v. Bloom*, 2 Bl. R. 928, S. C. 3 Wils. 456; *Sharp v. Lowther*, Cas. temp. Hardwicke, 293.) And although inhabitants cannot prescribe, they may allege a custom to have a right of common. (*Vin. Abt. Custom*, (B. 2.); *Owen*, 71.)

It is an acknowledged principle that, to give validity to a custom,—which has been well described to be an usage,—which obtains the force of law, and is in truth the binding law, within a particular district or at a particular place, of the persons and things which it concerns (see *Davy's Reports*, 31, 32, (a.)) it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption. It belongs to the judges of the land to determine whether a custom is reasonable or not. The question, what customs are reasonable and what are not, is one upon which the books are not altogether silent. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for "*consuetudo ex causa rationabili usitata privat communem legem*" (Co. Litt. 113 a), as the custom of gavelkind and borough-English, which are directly contrary to the law of descent; or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation. But, on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement: as a custom set up in a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude, and beneficial only to the lord. (Year B. Trin. 2 H. 4. fol. 24. B. pl. 20.) So a custom that the lord of the manor shall have £3 for every pound breach of any stranger (21 H. 4. (a.)) ; or that the lord of the manor may detain a distress taken upon his demesnes until fine be made for the damage, at the lord's will. (Litt. s. 212). In all these, and many other instances of similar customs which are to be found in the books, the customs themselves are held to be void, on the ground of their having no reasonable commencement, but as being founded in wrong and usurpation, and not on the voluntary consent of the people to whom they relate. (*Tyson v. Smith*, 9 Ad. & Ell. 421 ; 1 P. & Dav. 307 ; post, 41.)

What customs are valid.

A prescription by immemorial usage can in general only be for incorporeal hereditaments, which may be created by grant, such as commons, ways, waifs, estrays, wreck, warren, park, treasure trove, royal fishes, fairs, markets, and the like. (Co. Litt. 114 a ; 5 Rep. 109 b ; 1 Vent. 387 ; Bac. Abr. Customs, (B.) ; Com. Dig. Prescription (C.) ; Id. Franchises (A. 1). A prescription to have a free warren in a manor and in the demesnes thereof is good. (*Rex v. Talbot*, Cro. Car. 311 ; *Jones*, 320.) (As to franchises see *Cruise's Dig.* Tit. 27 ; 2 Bl. Comm. 37—40). The general rule with regard to prescriptive claims is, that every such claim may be good if by possibility

What may be claimed by prescription.

it might have had a legal commencement. (1 T. R. 667.) The right to hold a fair or market may be acquired by grant and by prescription. (2 Inst. 220). And where the grantee of a market, under letters patent from the crown, suffered another to erect a market in his neighbourhood, and to use it for the space of twenty-three years without interruption, it was adjudged that such user operated as a bar to an action on the case for a disturbance of his market. (*Holcroft v. Hest*, 1 Bos. & P. 400; see 2 Wms. Saund, 174, n.; and *Campbell v. Wilson*, 3 East, 294.) The lord of an ancient market may by time have a right to prevent other persons from selling goods in their private houses situated within the limits of his franchise. (*Moseley v. Walker*, 7 B. & C. 40; *Mayor of Macclesfield v. Pedley*, 4 B. & Ad. 404.) So he may determine in what part of the township the market shall be held, and shift it from place to place, or confine the right of holding it to a particular place. (*Curwen v. Salkeld*, 3 East, 538. *De Ruisen v. Lloyd*, 5 Ad. & Ell. 456.)

Tolls.

Toll *traverse*, which is defined to be a sum demanded for passing over the private soil of another, (Com. Dig. tit. Toll, (A.)), or a duty which a man pays for passing over the soil of another in a way not a high street, (Vin. Abr. tit. Toll, (A.)), or for a passage over the private ferry, bridge, &c. of another, (1 Sid 454,) may be claimed by prescription by a corporation or an individual, without alleging any consideration, and payment time out of mind is sufficient to support the prescription. (2 Wils. 296.) Until the above act, such toll could not have been claimed unless it had been taken time out of mind (Fitzh. tit. Toll. pl. 3), and reserved contemporaneously with the dedication of the way to the public. (*Pelham v. Pickersgill*, 1 T. R. 660).

In order to support a prescription against public right, a consideration must be proved; as where *toll-thorough*, that is, a toll for passing over the public highway, is claimed. (*Mayor and Burgesses of Nottingham v. Lambert*, Willes, 111; *Brett v. Beales*, 10 B. & C. 508.) And where the plaintiff claimed toll-thorough, and showed that the soil and the tolls before the time of legal memory belonged to the same owner, although they had been severed since, it was held that it was to be presumed that the right of passage had been granted to the public in consideration of the toll. (*Lord Pelham v. Pickersgill*, 1 T. R. 660.) A right of distress is incident to every toll, (Bac. Abr. Distress, F. pl. 6.) but it cannot be sold, except in the case of turnpike tolls under 3 Geo. 4, c. 126, s. 39. Tolls may be recovered in assumpsit, and no proof is given of anything like a contract by the party against whom the claim is made, and stallage, which is a satisfaction to the owner of the soil for the liberty of placing a stall upon it, may be recovered in the same way without showing any contract between the owner of the market and the occupier of the stall. (*Mayor, &c. of Newport v. Saunders*, 3 B. & Ad. 411.) The exemption from toll may also be claimed by prescription, or by the king's grant. (4 Inst. 252;

1 H. Bl. 206; 4 T. R. 130; 1 Bos. & Pul. 512; 7 Br. P. C. 126; *Mayor of Truro v. Reynolds*, 8 Bing. 275; *Lord Middleton v. Lambert*, 1 Ad. & Ell. 401; 3 Nev. & M. 841). And the citizens or burgesses of a city, borough, &c. may prescribe to be quit of tolls. (F. N. B. 226. I; 1 H. Bl. 206; Com. Dig. Toll, (G. 1).) As to the law of tolls in general, see *Gunning on Tolls*.

A title to lands and other corporeal substances, of which more certain evidence may be had, cannot be made by prescription, as that a man, and all those whose estate he has, have been seised time out of mind of particular lands. (Brooke, Prescription, 122; Vin. Abr. Pres. B. pl. 2; Dr. & St. dial. 1, c. 8; Finch. 132; 2 Bl. Comm. 264). What arises by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands, felons' goods, and the like. These not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by an inferior title. (Co. Litt. 114; 2 Bl. Comm. 265). A prescription for a right of common to all the subjects of the realm cannot be supported. (*Pell v. Towers*, Noy, 20; Br. Abr. Pres. pl. 71). Every man of common right may fish in the sea, or with lawful nets in a navigable river (*Warren v. Matthews*, 6 Mod. 73; Salk. 357), and therefore a prescription for a right of fishing in the sea, as annexed to certain tenements, is bad (*Ward v. Creswell*, Willes, 265), which is not merely the law of this country, but also of nations, (Grot. de Jure Belli et Pacis, b. 2, c. 3, s. 9; Bract. lib. 1, c. 12, s. 6); but a subject may have a several fishery in an arm of the sea by prescription. (*Mayor of Oxford v. Richardson*, 4 T. R. 439). And though *prima facie* every subject has a right to take fish found upon the sea shore between high and low watermark, such general right may be abridged by the existence of an exclusive right in some individual. (*Baggett v. Orr*, 2 Bos. & P. 472). A man cannot prescribe or allege a custom against a statute, because it is the highest matter of record in law, (3 T. R. 271; 11 East, 495), unless the custom or prescription be saved or preserved by another act. (Co. Litt. 115). And Lord Coke makes a difference between acts in the negative and in the affirmative; for a statute in the affirmative, without any negative express or implied, does not take away the common law: and likewise between statutes that are in the negative, for if a statute in the negative be declarative of the ancient law, a man may prescribe or allege a custom against it, as well as he may against the common law. (Hargrave's Co. Litt. 115 a, n. (15)). So a man cannot prescribe against another prescription, for the one is as ancient as the other; as if a man prescribe for a way, light, or other easement, another cannot prescribe for liberty to stop it when he pleases. (*Aldred's case*, 9 Rep. 58 b.; 2 Mod. 105; Com. Dig. Prescription, (F. 4)).

What cannot
be claimed by
prescription.

How prescriptive rights may be lost.

Formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. But by the statute of limitations, (32 Hen. 8, c. 2,) it is enacted that no person shall make any prescription by the *seisin* or possession of his ancestor or predecessor, unless such *seisin* or possession had been within threescore years next before such prescription made. (2 Bl. Comm. 263, 264.) And the remedy for such rights, so far as it depends upon real actions, is further abridged by the abolition of real actions after 31st December, 1834, by the statute 3 & 4 Wm. 4, c. 27, s. 36, (see *post.*) Where a profit of any kind to be taken out of lands has not been taken for a vast number of years, and the lands have been enjoyed without yielding it to a third person, the consequence is, that the title to such profit, whatever its nature, shall be presumed to be discharged. (3 Bligh, 245.) But a title gained by prescription or custom is not lost by mere interruption of possession for ten or twenty years, unless there be an interruption of the right, as by unity of possession of right of common, and the land charged therewith of an estate equally high and perdurable in both. (Co. Litt. 114 b.) An unity of possession merely suspends; there must be an unity of ownership to destroy a prescriptive right. (*Canham v. Fisk*, 2 Cr. & Jerv. 126.) Thus, if a person, having a right of common by prescription, takes a lease of the land for twenty years, whereby the common is suspended, he may, after the determination of the lease, claim the common again by prescription; for the suspension was only of the enjoyment, not of the right. (Co. Litt. 113 b.) A prescriptive right may be lost by the destruction of the subject-matter, (4 Rep. 88); but not by an alteration of the quality of the thing to which a prescription is annexed. (Hob. 39; 4 Rep. 86 a, 87, a.) An ancient grant without date did not necessarily destroy a prescriptive right; for it might be either before time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury. (*Addington v. Clode*, 2 Bl. Rep. 989.) A plea that before and at, &c., the defendant and all his ancestors, whose heir he is, from time whereof the memory of man is not to the contrary, have had, and been used and accustomed to have and of right ought to have had, and the defendant still of right ought to have for himself and themselves the sole and several herbage and pasturage of and in divers, to wit, 217 acres, &c., of a certain open field called, &c., was held to be disproved by showing a grant to the defendant's ancestor 81 years before for a valuable consideration; and such plea is not aided by the stat. 2 & 3 Wm. 4, c. 71, s. 1, which, if relied on, ought to be pleaded. (*Welcome v. Upton*, 5 Mee. & W. 398. See *Reg. v. Westmark*, 2 M. & Rob. 305.) It seems that a release of a right of way, or of a right of common, will not be presumed by mere non user for a less period than twenty years, although it is otherwise as to lights. (*Moore v. Rawson*, 3 B. & Cr. 339. See

past, pp. 66—67, and note on lights, *post*.) The right to hold courts for the determination of civil suits, granted by the king's charter to the steward and suitors of a court of ancient demesne, was held not to be lost by a non user of fifty years. (*Res v. The Steward, &c. of Havering*, 5 B. & Ald. 691; *Res v. The Mayor, &c. of Hastings*, Id. 692, n.)

Formerly a prescription could not run against the king, for *nullum tempus occurrit regi*, (2 Roll. 264, l. 40; Com. Dig. Prescription, (F. 1.)); and liberties and franchises were excepted in the statute 9 Geo. 3, c. 16, limiting the claims of the crown to sixty years; but see stat. 32, Geo. 3, c. 58. It will be observed that by the stat. 2 & 3 Wm. 4, c. 71, ss. 1, 2, (*ante*, p. 1, 5,) the crown is placed upon the same footing with the subject as to the rights affected by that act.

2. OF RIGHTS OF COMMON.

Several
species of
common.

Common is a right or privilege which one or more persons claim to take or use in some part or portion of that which another man's lands, waters, woods, &c. naturally produce, without having an absolute property in such lands, waters, woods, &c. It is called an incorporeal right, which lies in grant, as originally commencing by some agreement between lords and tenants, for some valuable purposes, which by age being formed into a prescription continues good, although there be no deed or instrument in writing that proves the original contract or agreement. (4 Rep. 37 a; 2 Inst. 65; Vent. 367; Bac. Abr. Common.) Common has been divided into five sorts, viz, 1st. *Common of pasture*, which is a right or liberty that one man or more have to feed or fodder their beasts or cattle in another man's land. 2dly, *Common of turbary*, or the liberty of cutting turves in another's soil, to be burnt in a house. (See Noy, 145; 7 East, 121; 3 Lev. 165.) 3rdly, *Common of piscary*, or a right and liberty of taking fish in another's pond, pool, or river. 4thly, *Common of estovers*, which is a right of taking trees, loppings, shrubs, or underwood, in another's woods, coppices, &c. (See Cro. Jac. 25, 256; 5 Rep. 25, a; 4 Rep. 87 a; Cro. Eliz. 820; Plowd. 381.) And 5thly, a liberty, which in some manors the tenants have, of digging and taking sand, gravel, stone, &c. in the lord's soil. (Bac. Abr. Common, (A.)) A party may prescribe to take the sole and several herbage which may be granted. (Co. Litt. 122; *Hoskins v. Robins*, Pollexf. 13; *Potter v. North*, 1 Vent. 385; *Welcome v. Upton*, 6 Mees. & W. 543); although it was formerly doubted, (*North v. Cor*, 1 Lev. 253.) Instances of sole pasturage are to be found in the South Downs, in Sussex, and they are frequently transferred in gross; it is the same with the cattle-gates in the north of England, although some have thought the owners of them are tenants in common of the soil. (*Welcome v. Upton*, 6 Mees. & W. 541, 2; *Res v. Whistley*, 1 T. R. 137.) A person may prescribe to have

the sole and several pasture, vesture, or herbage, for a *limited time in every year*, in exclusion of the owner of the soil. (*Fitz. Prescription*, 51; *Co. Litt.* 122 a; 2 *Roll. Abr.* 267, (L.) pl. 6; *Winch's Rep.* 6; *Hutt.* 45.) And a like prescription, in exclusion of the owner of the soil for the whole year, was held good, as it did not exclude the lord from his profits of mines, trees, and quarries. (*Hopkins v. Robins*, 2 *Saund.* 324; *S. C.* 2 *Lev.* 2; *Pollexf.* 13; 1 *Mod.* 74.) So a tenant may prescribe to have all the thorns growing upon such a place in exclusion of the owner of the soil. (*Douglass v. Kendal*, *Cro. Jac.* 256.) But a man cannot prescribe to have *common eo nomine* for the whole year, in exclusion of the lord, for this is held to be repugnant to the nature of the thing. (*Co. Litt.* 122 a; 1 *Roll. Abr.* 396, (A.) pl. 1, 2; 2 *Roll. Abr.* 267, pl. 3; 2 *Lev.* 268; 1 *Ventr.* 395.) However, it is said that the lord may by custom be restrained to a qualified right of common during a part of the year. (*Yelv.* 129; 1 *Brownl.* 187; *Cro. Jac.* 208, 257.) So it is said the Lord may be restrained, together with the commoners, from using a common at all during a part of the year (1 *Roll. Abr.* 405, 406); and that the commoners may prescribe to have common in exclusion of the lord for a part of a year. (2 *Roll. Abr.* 267 (L.), pl. 1; 1 *Wms. Saund.* 353, n (2)). So a man may prescribe to have a separate fishery, to the exclusion of the owner of the soil wholly from fishing; for he has still the profit of the soil and water. (*Co. Litt.* 122 a, and n.; 7 *Ventr.* 391. See 2 *Saund.* 326).

Common of pasture is, where one person has, in common with other persons, the right of taking by the mouths of his cattle the herbage growing on the land of which some other person is the owner. This species of common is either appendant, appurtenant, or in gross. (*Selw. N. P. Common*, s. 2).

Common ap-
pendant.

Common appendant is of common right, (2 *Inst.* 86; 2 *Bl. Comm.* 33,) and it may be claimed in pleading as appendant, without laying a prescription, although appendancy implies a prescription. (*Harg. Co. Litt.* 122 a. n. 2). It can only be claimed in the lord's wastes, (2 *Inst.* 85, 1 *Roll.* 396; 4 *Rep.* 37,) for the claimant's own commonable cattle levant and couchant upon the land. (*Ib.*; *Burr.* 320). Levancy and couchancy mean the possession of such land as will keep the cattle claimed to be commoned during the winter. (5 *T. R.* 46; *Willes*, R. 227; 8 *T. R.* 396. See *Willis v. Ward*, 2 *Chit.* 297). A right of common for cattle, "*levant and couchant*," upon inclosed land, extends to such cattle as the winter eatage of the land, together with the produce of it during the summer, is capable of maintaining. (*Whitelock v. Hutchinson*, 2 *Mood. & Rob.* 205). Case by commoner for disturbing his common by putting on cattle. Plea, a right of common appurtenant for cattle levant and couchant; that the cattle in the declaration mentioned were defendant's own commonable cattle levant and couchant, and that he put them on to use the common, which is the same, &c. Replication, that "all the said

cattle in the said declaration mentioned" were not defendant's own commonable cattle levant and couchant, in manner, &c. Conclusion to the country. It was held, that the defendant maintained his issue by showing that, on the occasion of every alleged disturbance, some of the cattle put on were levant and couchant, and that on these pleadings plaintiff could not insist on a surcharge. The word "all" was interpreted to mean that the levancy and couchancy was untruly alleged as to all the cattle; not that it was truly alleged of some, and falsely of others. (*Bowen v. Jenkin*, 6 Ad. & El. 911). This species of common must have existed from time immemorial, (1 Roll. Abr. 396); and cannot be claimed by prescription, as appurtenant to a house without any curtilage or arable land, (1 Roll. Abr. 397; *Scholes v. Hargraves*, 5 T. R. 46); but it may be claimed as appendant to a cottage, for a cottage contains a curtilage. (*Emerson v. Selby*, 1 Salk. 169; S. C. 2 Lord Raym. 1015; but quere since stat. 15 Geo. 3, c. 32). Common appendant can only be claimed for such cattle as are necessary for tillage, as horses and oxen to plough the land, and cows and sheep to manure it. (Co. Litt. 122 a). Common appendant is so necessarily incident to the land, that it cannot be severed from it, and therefore, however often the land may be divided, every parcel of it is entitled to common appendant. (Willes, 230). A person cannot prescribe for a right of common as occupier of a messuage. (*English v. Burnett*, 2 Wils. 258). A claim of a right of common without stint, as annexed to an ancient messuage without land, cannot as such exist by law. (*Benson v. Chester*, 8 T. R. 396). The occupier of a messuage and lands, who has common in the lord's waste, may set up a custom to cut rushes, as annexed to his right of common. (*Bean v. Bloom*, 2 Bl. R. 926; S. C. 3 Wils. 456).

Common appurtenant may be claimed as well by grant within time of memory, as by prescription; and after a unity of possession in the lord of the land, in respect of which the right of common was claimed with the soil and freehold of the waste; proof that the lord's tenant of the land had for fifty years past enjoyed the right of common on the waste, is evidence for the jury to presume a new grant of common as appurtenant, so as to support a count in an action by the tenant for surcharging the common, declaring upon his possession of the messuage and land with the appurtenances, and that by reason thereof he was entitled of right to the common of pasture, as belonging and appertaining to his messuage and land; and also to support another count, in substance the same, alleging his possession of the messuage and land, and that by reason thereof he was entitled to common of pasture. (*Cowlam v. Slack*, 15 East, 108). This species of common, though frequently confounded with common appendant, differs from it in many circumstances. It may be created by grant, whereas common appendant can only arise from prescription. It may be claimed as annexed to any kind of land, whereas common appendant can only be

Common ap-
partenant.

claimed on account of ancient arable land. (4 Rep. 37 a.) And it may be not only for beasts usually commonable, such as horses, oxen, and sheep, but likewise for goats, swine, &c. (1 Roll. Abr. 399). The principle furnished by *Potter v. North*, (1 Wm. Saund. 350; *Hoskins v. Robins*, 2 Wm. Saund. 324,) as to claims to common by custom or prescription, seems to be to ascertain the extent of the rights conferred, and the rights reserved by the grant, and to see whether the act be in derogation of the latter. Thus, where tenant of B. prescribed to have for himself and his tenants, &c., occupiers of the farm of B., the sole and exclusive right of pasture and feeding of sheep and lambs on L. as to the said farm of B. belonging and appertaining; it was held that this did not entitle him to take in the sheep and lambs of other persons to pasture in L., for that by the terms of the grant some interest in the pasture was reserved to the lord, and the above practice was prejudicial to such interest. (*Jones v. Richard*, 6 Ad. & Ell. 530. See 5 Id. 413).

Common because of vicinage.

Common because of vicinage or neighbourhood, is where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields without any molestation from either. This is indeed only a permissive right, intended to excuse what, in strictness, is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common; but if they escape, and stray thither of themselves, the law winks at the trespass. (Co. Litt. 121, 122; 4 Rep. 38; 2 Bl. Comm. 33). If to an action of trespass in the common called A., the defendant plead that A. and B. commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the whole prescription. (*Morwood v. Wood*, 4 T. R. 157). The plaintiff being possessed of a house and land in E., had for sixty years exercised rights of common in W.: it appeared at the trial that this was done near the boundary of two commons of W. and E., which lay open and uninclosed, and adjacent to each other, and that the parties exercising the right did not at the time know the exact boundary; that the plaintiff had, on the previous inclosure of the common at E., obtained an allotment there in respect of his estate:—held that it was properly left to the jury to say, whether the evidence was referable to an exercise of the right in E., and a mistake of the boundary, or to an exercise of the right in W. (*Hetherington v. Vane*, 4 B. & Ald. 428). Common *pur cause de vicinage* cannot be set up as an excuse for cattle rambling from downs subject to common of pasture, into downs of which the owner has exclusive possession, notwithstanding there be no fence or visible boundary separating the downs. (*Heath v. Elliot*, 4 Bing. N. C. 388; 6 Scott, 172). Where one of two adjoining commons, with commons

of vicinage, is inclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway, which led over the one to the other; yet, as the separation was not complete, so as to prevent cattle straying from one to the other by means of the highway, the common by vicinage still continues. (*Gullett v. Lopes*, 13 East, 348). In case of open field lands, the owner of any particular spot may, by custom, exclude the other from right of pasture there by inclosing his own land. (2 Wils. 269). By a local act, all rights of common whatever in B. were extinguished; the wastes were divided; the owners of allotments were directed to inclose and authorized to distrain the cattle of strangers trespassing. No fence having been made:—held, that the owner of an allotment in B. could not distrain cattle which had strayed into his allotment from a common in W. in pursuance of an alleged right of common *pur cause de vicinage* in the inhabitants of W. (*Wells v. Percy*, 1 Scott, 426; 1 Bing. N. R. 556). It seems that the cattle would be liable to distress, or the owner to an action of trespass, notwithstanding the want or defect of fences, if the cattle were suffered to remain in the *locus in quo* after notice to the owner that they were trespassing there. (*Id.*) It was questioned whether a notice in fact to the commissioners of W., (without inclosure), that all the rights of common in B. were extinguished, would put an end to the legal excuse of trespasses *pur cause de vicinage*. (*Id.*)

Common in gross is such a right of common as is neither Common in appendant nor appurtenant to land, but is annexed to a man's gross person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by the parson of a church, or the like corporation sole. It is a separate inheritance, entirely distinct from landed property, and may be vested in one who has no land in the manor. (Co. Litt. 122 a; 2 Bl. Comm. 34). Common appurtenant for a certain number of cattle may be converted into common in gross. (Cro. Jac. 15; 5 Taunt. 244). If A. and all those whose estate he has in the manor of D., have had from time immemorial a fold course, that is common of pasture for any number of sheep not exceeding 300, in a certain field, as appurtenant to the manor, he may grant over to another this fold course, and so make it in gross; because the common is for a certain number, and by the prescription the sheep are not to be levant and couchant on the manor, but it is a common for so many sheep appurtenant to the manor, which may be severed from the manor as well as an advowson, without any prejudice to the owner of the land where the common is to be taken. (1 Roll. Abr. 402, pl. 3; *Day v. Spooner*, S. C. Cro. Car. 432; Sir W. Jones, 375; 3 Wms. Saund. 327, n.). It seems that a right of common in gross *sans nombre*, in the latitude in which it was formerly understood, cannot exist. (1 Saund. 346; 1 Ld. Raym. 407; Willes, 232; 8 T. R. 396). A corporation may prescribe for common in gross for cattle levant

Presumption
that waste
land belongs
to lord of
manor.

and *couchant*, within the town, but not for common in *gross sans nombre*. (*Mellor v. Spateman*, 1 Saund. 343; *Clarkson v. Woodhouse*, 5 T. R. 412, n.).

Prima facie the lord of a manor is entitled to all waste lands within the manor; and it is not essential that the lord should show acts of ownership of such lands; and evidence that the public have been used to throw rubbish on waste lands, is rather evidence that it belongs to the lord than to any private individual. (*Doe d. Dunraven v. Williams*, 7 Carr. & P. 332). A right to any part of the waste may, however, be established against the lord by repeated acts of ownership, as by cutting trees, digging turf, and the like. (*Tyrwhitt v. Wynne*, 2 B. & Ald. 554; *Barnes v. Mawson*, 1 Maule & S. 77; *Richards v. Peake*, 2 B. & C. 918). The lord may, with the consent of the homage, grant part of the soil for building, if he has immemorially exercised such right. (*Folkard v. Hemmett*, 5 T. R. 417). In like manner there may be a valid custom in a manor within the limits of an ancient forest belonging to the crown, for the lord, with the assent of the homage, to grant parcels of the waste to be holden by copy of court-roll, and for the grantees to inclose the same, and to hold them in severalty against the commoners, and in exclusion of their rights. (*Boulcott v. Winmill*, 2 Campb. 261; see *Northwich v. Stanway*, 3 Bos. & P. 346). But without a custom for the purpose the lord cannot make a new grant of copyhold. (*Rex v. Hornchurch*, 2 B. & Ald. 189; *Rex v. Wilby*, 2 Maule & S. 604). But a custom for the lord to grant leases of the waste of the manor without restriction, is bad in point of law. (*Badger v. Ford*, 3 B. & Ald. 153). But a custom to inclose (even as against a common right of turbary) leaving sufficiency of common, is good; but the *onus* of proving a sufficiency left lies on the lord. (*Arlett v. Ellis*, 7 B. & C. 346; see *Rogers v. Wynne*, 7 D. & R. 521). The statute 4 & 5 Vict. c. 35, s. 91, enacts, "That where by the custom of any manor the lord of such manor is authorized, with the consent of the homage of such manor, to grant any common or waste lands of such manor to be holden of the lord by copy of court roll, nothing in this act contained shall operate to authorize or empower the lord to grant any such common or waste lands, without the consent of the homage assembled at a customary court holden for such manor, nor shall any court holden for such manor be deemed or taken to be a good or sufficient customary court for such purpose, unless the same shall have been duly summoned and holden according to the custom of such manor in such cases used and accustomed before the passing of this act, and unless there shall be present at such court a sufficient number of persons holding lands of such manor by copy of court roll, to constitute according to such custom a homage assembled at such court."

A custom for tenants to approve by the lord's consent, and by presentment of the homage of the court baron, does not

restrain the lord's right to approve. (2 T. R. 392, n.) The lord may dig clay pits on the common without leaving sufficient herbage, if it can be proved that such right has been immemorially exercised. (*Bateson v. Green*, 5 T. R. 411). A custom for the owners of a waste to set out to the owners of certain ancient messuages portions of the waste to be by them held in severalty for getting turves therein, and when the portions set out are cleared of turves, for the owners of the waste to inclose and approve such portions, to hold at their pleasure in severalty for ever, freed of all common of turbary and pasture, is good. (*Clarkson v. Woodhouse*, 5 T. R. 412, n.; and see *Bateson v. Green*, 5 T. R. 411; *Place v. Jackson*, 4 D. & R. 318; 2 Atk. 189). A person seised in fee may approve, although he be not lord. (*Glover v. Lane*, 3 T. R. 445). But there can be no approvement against the tenants of a manor who have a right to dig gravel on the wastes, and to take estovers, (*Duberry v. Page*, 2 T. R. 391; see *Grant v. Gunner*, 1 Taunt. 436), although the lord may approve against common of pasture by the stat. of Merton, 20 Hen. 3, c. 4, notwithstanding there may be other rights of common against which he cannot approve. (*Shakespear v. Poppin*, 6 T. R. 741).

The greater part of the commons in England have been inclosed under local acts of parliament. The general inclosure acts are 41 Geo. 3, c. 109, 1 Geo. 4, c. 23, and 6 & 7 Wm. 4, c. 115.

A custom for all victuallers to erect booths on a common, being parcel of the waste of a manor (selected by the lord for holding fairs yearly, every fortnight), and to place posts and tables there, a reasonable time before the Monday next after the feast of Pentecost, and to continue them so erected until the feast of All Souls, each paying therefore to the lord a compensation of 2d., is good. (*Smyth v. Tyson*, 1 P. & Dav. 307; 9 Ad. & Ell. 486).

The interest which a commoner has in the common is, in the legal phrase, to eat the grass with the mouths of his cattle. He must not meddle at all with the soil, nor with its fruit and produce, even though it may eventually improve and meliorate the common. (1 Roll. Abr. 406, pl. 10; 12 H. 8, 2 a; *Sir Simon de Harcourt's case*). Therefore he cannot cut the grass, wood, bushes, fern, or other thing, growing on the common; nor can he cut the molehills, or make fishponds there. (12 H. 8, 2 a; per Brooke, J. 2 Leon. 202; Godb. 182, pl. 258; *Asen. Bridg.* 10; *Samborn v. Harilo*, 2 Bul. 116; *Cerrill v. Pack*, 1 Sid. 251; *Howard v. Spencer*). If the lord plant trees on the common, and the commoner thereby cannot have his common so beneficially as he ought, he cannot cut them down, for they are part of the soil itself, being the fruit and produce of the soil, but he must bring an action on the case, or an assize. (6 Term Rep. 483; *Sadgrove v. Kirby*, 1 Bos. & Pull. Rep. 13). So if the lord's rabbits on a common increase so much that there is not a sufficiency of common left, a commoner cannot fill up the coney-burrows,

Interest of
Commoner,

for it would be a meddling with the soil, and a judging for himself, but he must have recourse to his action against the lord. (*Cooper v. Marshall*, 1 Burr. 259; 8 C. 2 Wils. 51; 1 Roll. Abr. 405, pl. 3). Much less can a commoner kill the rabbits to prevent their increase, to the prejudice of the common. (*Hodson v. Grissel*, 1 Roll. Abr. 405, pl. 1, 2; Cro. Jac. 195; Yel. 104; 8 C. cited, 1 Latw. 108; 2 Leon. 203; see 1 Wms. Saund. 353, n.).

Extinguishment of common.

A right of common may be extinguished by a release, by unity of possession of the land, by severance, or by the enfranchisement of a copyhold. A right of common may be extinguished by a release of it to the owner of the soil; and if the commoner releases part of the common, it will operate as an extinguishment of the whole, because the right is entire throughout the whole land, therefore a release of part is a release of the whole. (*Rotharham v. Green*, Cro. Eliz. 693; 1 Show. 350.) Common appendant and appurtenant become extinguished by unity of possession of the land to which the right of common was annexed with the land in which the common was. But in order to extinguish a right of common by unity of possession, it is necessary that the party should have an estate equal in duration, quality, and other circumstances of right, in the tenements in respect of which the common is claimed, and in the premises over which the right was claimed. (*Res v. Inhabitants of Hermitage*, Carth. 239; *Bradshaw v. Eyre*, Cro. Eliz. 570; 4 Rep. 38, a.) Common appendant or appurtenant for cattle *levant and couchant* may also be extinguished by severance. As where a person, having common of this kind annexed to a messuage or tenement, conveys the messuage or tenement, excepting the common, the common is extinguished. (1 Roll. Ab. 401.) Where a right of common is annexed to a copyhold, and the lord grants the land to the copyholder and his heirs, with the appurtenances, the common is extinguished, because it was annexed to the customary estate, which being converted into a freehold, the right of common is gone. (*Marshall v. Hunter*, Cro. Jac. 253; Gilb. Ten. 224.)

By what words a right of common will pass.

Where common has been extinguished by unity of ownership, and a grant is made of the land, to which, before the extinguishment, the right of common was attached, and the words "appertaining" and "belonging" only are used, the right will not pass, those words not being sufficient to revive the right, though those who have occupied the tenement since the extinguishment have always enjoyed the common. But if the words "or therewith used and enjoyed" are inserted, they would be sufficient to revive the right. (*Clements v. Lamheri*, 1 Taunt. 205; *Barlow v. Rhodes*, 1 Cr. & Mees. 448.) The effect of an enfranchisement of copyholds being to extinguish all rights and privileges annexed to the copyholder's estate as such, if a copyholder has a right of common, and his copyhold is enfranchised, the common is gone, since the copyhold tenure has ceased: and the right of common will not pass

by the word "appurtenances" in the deed of enfranchisement, (*Moore*, 667; *Cro. Jac.* 253; 2 *Ld. Raym.* 1225; *Salk.* 170, 364); but must be made by express grant. (*Moore*, 667; *Cro. Eliz.* 570.) Where a copyhold tenement, to which a right of common was originally appendant, having vested in the lord by forfeiture, was regranted by him as copyhold, with the appurtenances; it was held, that having always continued demisable while in the hands of the lord, it was a customary tenement, and as such was still entitled to a right of common. (*Badger v. Ford*, 3 B. & Ald. 153.) And as a copyholder, who has common in a waste, without the manor of which his copyhold is parcel, has it as annexed to the land, and not to his customary estate, such common is not extinct by enfranchisement of the copyhold, though there be no words of regrant. And after enfranchisement, the feelee must, previously to the stat. 2 & 3 Wm. 4, c. 71, have prescribed in a *quæ estate* of his lord for himself and his customary tenants till the time of the enfranchisement, and since that time for the feelee and his heirs, as appurtenant to the enfranchised tenement. (*Berwick v. Matthews*, 5 Taunt. 365.) Equity will, under certain circumstances, decree the continuance of common, where it would be extinct at law. (*Styest v. Walker*, 2 Vern. 250.)

In case of the enfranchisement of copyholds, under the statute 4 & 5 Vict. c. 35, the 81st section provides that the lands are to become freehold, subject to the payment of the consideration for the enfranchisement; but it is provided that nothing contained in that act shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such lands, but such right shall continue attached thereto, notwithstanding the same shall become freehold.

Common of turbary is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can only be appurtenant to a house, not to land; for turves are to be burnt in a house; nor can it extend to a right to dig turf for sale. (*Valentine v. Penny*, Noy, 145.) A custom for all the customary tenants of a manor, having gardens, to dig turf on the waste, for making grass plots, at all times of the year, and as often and in such quantity as occasion required, is bad in law, as being indefinite, uncertain, and destructive of the common. (*Wilson v. Wilson*, 7 East, 121.) Common of turbary, appurtenant to a house, will pass by a grant of such house, with the appurtenances. (*Solme v. Bullock*, 3 Levinz, 165.)

The usual remedy adopted by commoners for an injury to the right of common, is an action on the case for a disturbance of the right of common, which may be maintained either against the lord or owner of the soil, (*Hassard v. Cantrell*, Lutw. 101,) a stranger or a commoner. (1 *Selw. N. P.* 422, 10 ed.) In this action the plaintiff must prove an injury sustained; but the smallest injury is sufficient, as that of taking away the manure which was dropped on the common by the cattle. (*Pinder v. Wadsworth*, 2 East, 154. See cases cited in *Marsati*

Common of
turbary.

Remedy for
disturbance
of right of
common.

v. Williams, 1 B. & Ad. 426, and *Blofield v. Payne*, 4 B. & Ad. 410.) In case for disturbance of a right of common, the declaration alleged that the mayor, aldermen, and burgesses of the town and borough of Stamford had the right in question for every resident freeman paying scot and lot: it appeared in evidence that the right relied upon was an ancient right. By 2 & 3 Will. 4, c. 64, and 5 & 6 Will. 4, c. 76, part of an additional parish is thrown within the borough of Stamford: held, that the declaration was not supported, as the right claimed was larger than that proved. (*Beadsworth v. Torkington*, 1 G. & D. 482.) In an action on the case for disturbance of common, when the defendant justifies under a right of common for his cattle *levant and couchant*, the plaintiff must new assign, if he intends to prove a surcharge. (*Bowen v. Jenkins*, 2 Nev. & P. 84; 6 Ad. & Ell. 911.)

If one of the commoners surcharges the common, that is, puts more cattle into the common than he is entitled to do, the commoner who is injured may maintain an action on the case against the other for a surcharge, notwithstanding he has himself been guilty of a surcharge. (*Hobson v. Todd*, 4 T. R. 71.) In an action on the case for the surcharge of a common, the plaintiff may declare generally for the injury, without stating the defendant's right of common, and how he had exceeded that right. (*Atkinson v. Teesdale*, 2 W. Bl. 817; 3 Wils. 278. See *Cheesman v. Hardham*, 1 B. & Ald. 706.) In case for a surcharge of common, the plaintiff need not show that he was exercising his right of common at the time of the surcharge; but only that he could not enjoy his common so beneficially as he ought. (*Wells v. Watling*, 2 W. Bl. 1233.) As to the right of distress for a surcharge, see 1 Wms. Saund. 346 c. 346 d.

It was held, that where a common had been inclosed for twenty years, the commoner's right of entry was gone, and that he must resort to his action of assize of common. (*Hawks v. Bacon*, 2 Taunt. 159; *Cresch v. Wilmot*, Id. 160, n.) But writs of assize have been abolished by stat. 3 & 4 Will. 4, c. 27, s. 36.

Right of com-
moners to
abate.

It is the policy of the law not to allow commoners to abate except only in few cases. The abator is a judge in his own cause, which ought seldom to be permitted, whereas an action will best ascertain the just measure of the damages he has sustained. The cases where the law allows an abatement by a commoner, are where the acts of the lord are directly contrary to the nature of the common. For by the grant of it, the grantor gives every thing which is incident to the enjoyment of the grant, such as free ingress, egress, &c. Therefore, if the lord erect a wall, gate, hedge, or fence around the common to prevent the commoner's cattle from going into the common, the commoner may abate the erection, because it is inconsistent with the terms of the grant. (2 Roll. Abr. 145, (W.) pl. 2; *Cooper v. Marshall*, 1 Burr. 259; *Sadgrove v. Kirby*, 6 Term Rep. 485.) The power of abatement in this case seems analogous to other cases where the acts done are

inconsistent with the terms of the grant; as if the grantor of a way, &c. stops it up, the grantees may abate the erection. So where the commoner is deprived of part of his common, by the erection of a wall, gate, or hedge upon the common itself, it seems he may abate the erection, for it deprives him of his common, and forms no part of the soil of the common, and by such abatement the commoner does not at all meddle with the soil. (*Mason v. Caesar*, 2 Mod. 65; 2 Inst. 88; Litt. Rep. 38). And yet as the lord may approve, leaving a sufficiency of common, the commoner acts at the peril of being punished in an action of trespass, provided the lord has left a sufficiency of common. When a part and not the whole of a common had been inclosed, a commoner in asserting his right of common may throw down the whole of the hedge erected on the common, and a plaintiff in trespass cannot recover against him on a new assignment, because he had thrown down more than sufficient to admit his cattle. (*Arlett v. Ellis*, 7 B. & C. 346; 9 D. & R. 897; 9 B. & C. 671). But where a hedge or erection is made upon other land, which is no part of the common, but surrounds the common, the commoner can only abate so much of the erection as to make a way for his cattle to go into the common. (15 Hen. 7, 10, b. pl. 18; 29 Edw. 3, 6; 2 Inst. 88, 2; *Mason v. Caesar*, 2 Mod. 65. See 1 Wms. Saund. 353, a.). If the lord of a manor plant trees upon a common, a commoner has no right to cut them down; his remedy is only by an action. (6 T. R. 483).

A common of fishery is a right of fishing in common with other persons in a stream or river, the soil whereof belongs to a third person. This does not differ in any respect from any other right of common, (Salk. 637), and trespass will not lie for an injury to it. A person having a common fishery in another's land cannot cut the grass growing on the bank. (13 Hen. 8, p. 15, b.). Under ancient deeds recognizing a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brushwood, through which the fish might escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape is debarred, except in times of extraordinary flood. (*Weld v. Hornby*, 7 East, 195). As to the right of fishery, see Selw. N. P. tit. Fishery). It seems that the owner of a several fishery, in ordinary cases, and when the terms of the grant are unknown, may be presumed to be the owner of the soil. (*Duke of Somerset v. Fogwell*, 5 B. & C. 875). Such an owner has the exclusive right of taking the fish within particular limits. (3 Salk. 360; 2 Salk. 637. See Co. Litt. 122, a. n. 7; *Rex v. Ellis*, 1 Maule & S. 652.)

Common of fishery.

Where there has been possession of a fishery for a considerable length of time, a person claiming a sole right to it may bring a bill to be quieted in the possession of it, though he has not established his right at law. (*Mayor of York v. Pilkington and others*, 1 Atk. 282). And if the persons who

dispute the right are numerous, so that it cannot be determined in one action at law, the party claiming an exclusive right may go to a court of equity first, which will direct an issue for settling the right as in disputes between the lords of manors and their tenants or the tenants of different manors. (*Lord Tenham v. Herbert*, 2 Atk. 483). But if the question about a right of fishing arises between two lords of manors, neither of them can go into equity for relief until the right has been established at law. (*Lord Tenham v. Herbert*, 2 Atk. 483; *Whitchurch v. Hyde*, Id. 391; *Welby v. Duke of Rutland*, 6 Br. P. C. 576; see 1 Br. C. C. 40, 572.)

As to the law of common in general, see Bac. Abr. Common; Com. Dig. Common; Cruise's Dig. tit. XXIII. As to pleading, see *ante*, pp. 21, 23.)

3. OF THE PRESUMPTION OF GRANT OF EASEMENTS.

Foundation of presumption, as to incorporeal rights.

For a long series of years prior to the passing of the act 2 & 3 Wm. 4, c. 71, judges had been in the habit, for the furtherance of justice and for the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years, by analogy to the statute of limitations, 21 Jac. 1, c. 16. Such presumption did not always proceed on a belief that the thing presumed had actually taken place, but, as said by a learned author, (2 Stark. on Ev. 669), "a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation; and though in theory it was mere presumptive evidence, in practice and effect it was a bar." The act 2 & 3 Wm. 4, c. 71, is intended to make that possession a bar or title of itself, which was so before only by the intervention of a jury. (*Bright v. Walker*, 4 Tyrw. 507; S. C. 1 Cr. Mee. & Rosc. 217. See *ante*, pp. 7-10.)

The presumption of a legal title, by grant or otherwise, to incorporeal rights in the lands of others, founded on adverse possession and enjoyment of such rights for the space of twenty years, appears to have been adopted in analogy to the enactment of the statute of limitations, 21 Jac. 1, c. 16, which made an adverse enjoyment of twenty years a bar to an action of ejectment, (*Holcroft v. Heel*, 1 Bos. & Pull. 460; 2 Saund. 175, a.) for as an adverse possession of that duration will give a possessory title to the land itself, it seems to be also reasonable that it should afford a presumption of right to a minor interest arising out of land. (*Campbell v. Wilson*, 3 East, 294; *Read v. Brookman*, 3 T. R. 151). This rule, according to Lord Mansfield, "is founded upon principles of sound policy and convenience," (*Cowp.* 110), and the grant is pre-

samed, as the same learned judge declares, "for the purpose and from a principle of quieting a long possession." (Id. 215). The rule was resorted to, with the view of relieving the infirmity and necessity of mankind, who require, for the preservation of their property and rights, where there is no written document, the admission of some general principle to take the place of individual and specific belief, and the legal presumption supplied the place of such belief. (*Hillary v. Waller*, 12 Ves. 266).

A presumption of a grant is raised upon the general principle, that what has been done should be presumed to be rightly done; *ex diuturnitate temporis omnia presumuntur solenniter esse acta*. (Co. Litt. 6, b.). In applying this principle to a right of way, if it be found that the act has been often repeated, (for the occasional use of a walk or a path across a man's field would hardly be such a use as would establish the right), but if the act must necessarily have been often repeated with the knowledge of the persons acting upon an adverse right, it affords a strong presumption in favour of the right so exercised. The same principle is applied to presumption in the case of light or of flowing water. (3 B. & C. 621, 622). If there has been an uninterrupted possession of light, water, or any other easement for twenty years, it affords a ground for presuming a right by grant, covenant or otherwise, according to the nature of the easement, and if there is nothing to rebut the presumption, a jury may be directed to act upon it. (*Yard v. Ford*, 2 Wms. Saund. n. (2); *Cross v. Lewis*, 2 Barn. & Cres. 686; S.C. 4 Dowl. & Ryl. 234; *Livett v. Wilson*, 3 Bing. 115; and see the judgment of Holroyd J., *Williams v. Morland*, 2 Barn. & Cres. 914; S.C. 4 Dowl. & Ryl. 568, and the cases there cited). But the rule was subject to this qualification, that the possession was with the acquiescence of him who was seised of an estate of inheritance; for a tenant for life or years has no power to grant any such right for a longer period than during the continuance of his particular estate, (2 Wms. Saund. 174, n. (2); *Daniel v. North*, 11 East. 372; *Barber v. Richardson*, 4 Barn. & Ald. 579; *Wood v. Vaut*, 5 Barn. & Ald. 454; S.C. 1 Dowl. & Ryl. 20); but if the easement existed previously to the commencement of the tenancy, the fact of the premises having since been for a long period in the possession of a tenant will not defeat the presumption of a grant. (*Cross v. Lewis*, 2 B. & Cr. 686).

There is nothing in the act 2 & 3 Wm. 4, c. 71, to interfere with a claim of a right of way or other easement by express grant. (*Bright v. Walker*, 1 Cr. M. & R. 223; *ante*, p. 10; *Livett v. Wilson*, 3 Bing. 115; *Plant v. James*, 2 N. & M. 517; 4 Ad. & Ell. 749, 765; *Blewitt v. Tregonning*, 3 Ad. & Ell. 564). Although that statute has facilitated the proof of profits à prendre and easements, it does not appear to have superseded the common law.

How far prescription act has superseded common law.

the statute or according to the common law. In *Onley v. Gardiner*, 4 Mees. & W. 496, where the defendant failed in proving a sufficient title under the statute, in consequence of an unity of possession; the court after argument, in which it was held that such unity defeated the title under the statute, allowed the defendant to amend his plea, by pleading a right of way immemorially. (See *Richards v. Fry*, 3 Nev. & P. 72). In *Welcome v. Upton*, 6 Mees. & W. 403, *Parks, B.* said, The only question upon which there seems any doubt is this: whether, supposing a right of pasturage to be a profit to be taken out of the land, the defendant can plead in the old form, claiming the right from time immemorial; because the first section of stat. 2 & 3 Wm. 4, c. 71, prevents such right, when enjoyed for thirty years, from being defeated, by showing that it first existed prior to that time. I think, however, that under the first section the proper mode is to plead the enjoyment of the right for the periods therein mentioned. (*Welcome v. Upton*, 6 Mees. & W. 403, 4).

Pleas of non-existing grant.

In order to obviate the difficulty of proving an immemorial usage, it became a practice to plead a right of way by what was termed a *non-existing grant*, (*Blewitt v. Tregonning*, 3 Ad. & Ell. 554), that is a *feigned grant* by deed (supposed to be lost) from a former freeholder of the land, in or upon which the easement was exercisable, to a former freeholder of the tenements in respect of which it was claimed, but it was necessary that the names of the parties to, and the date of, such supposed grant should be stated, (*Hendy v. Stephenson*, 10 East, 55); but proof of the deed is excused, if it be averred that the deed has been lost by time and accident. (*Read v. Brookman*, 3 T. R. 151). It is necessary to support the plea, if denied, by proof that at the anterior period stated, the parties described as the former freeholders (the pretended grantor and grantees) of the easement really were such freeholders concurrently of the respective properties. (*Blewitt v. Tregonning*, 3 Ad. & Ell. 554). Defendant pleaded a grant of right of way by deed, subsequently lost. Plaintiff in his replication traversed the grant. At the trial, there being conflicting testimony as to the uninterrupted user of the way, the judge directed the jury, that if, upon this issue, they thought defendant had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, they would find for the defendant; if they thought there had been no way granted by deed, they would find for the plaintiff:—it was held that this direction was right. (*Livett v. Wilson*, 3 Bing. 115; 10 Moore, 439. See *Doe d. Fenwick v. Reed*, 5 B. & Ald. 232). If the plaintiff merely traverse a non-existing grant of a way, he cannot on the trial give evidence to show that the supposed grantor was not, as alleged in the plea, seised in fee, even for the purpose of rebutting the presumption of the grant. (*Cowlisham v. Cheslyn*, 1 Cr. & Jerv. 48; Chitty PL 697, 6th edition). With reference to pleas of this kind, it was said by

Littledale, J.—"If the evidence establish an user as far back as memory goes, and there does not appear to have been any time at which it did not exist, that is proof of prescription; and supposing the evidence sufficiently strong, a prescription is what the jury would find, and they have no right to find a grant, unless more be shown. Supposing the evidence in such a case to leave it doubtful whether the right existed sixty or seventy years ago, it may be protected under a plea of *non-existing* grant; but if the evidence of user goes far enough to prove a prescription, such evidence cannot be relied on to prove a grant." (*Blewitt v. Tregonning*, 3 Ad. & El. 583, 584.)

A right of way, or a right of passage for water (where it does not create an interest in land) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and a freehold interest cannot be created or passed otherwise than by deed. (*Hewitt v. Shippam*, 5 B. & C. 221). A term for years in an incorporeal hereditament, or in a thing lying in grant, cannot be created without deed. (14 Vin. Abr. tit. Grant (G a); 2 Roll. Abr. 63, tit. Grant (G); Co Litt. 85, a; 5 B. & C. 882). Where a subject is owner of a several fishery in a navigable river, where the tide flows and reflows, granted to him (as must be presumed) before *magna charta*, by the description of "*separalem piscariam*," it being an incorporeal hereditament, a term for years cannot be created in it without deed. (*Duke of Somerset v. Fogwell*, 5 B. & C. 875). Where there was an agreement in writing, but not under seal, to let a messuage, together with the full and free and exclusive license and leave to hunt, hawk, course, shoot, and sport over a manor, and the tenant entered and was possessed during the term, it was held, in an action of assumpsit on the agreement for the rent, on demurrer to a plea, that not being by deed, the agreement was void, because an *incorporeal hereditament* was agreed to be let, and that the plaintiff was not entitled to recover in respect of the actual enjoyment of the premises let by the defendant, of which he had taken possession. (*Bird v. Higgins*, 2 Ad. & Ell. 696; 4 Nev. & M. 505; 1 Har. & Woll. 61; 6 Ad. & Ell. 824). A license to a stranger to use a common, in effect amounting to a grant of the common of pasture, can only be by deed. (*Hoskins v. Robins*, 2 Wms. Saund. 328, and n. 12; Sheph. T. 330). Where the plaintiff in replevin answered an avowry for damage feasant by a plea of license from the commoner, who had right for twenty beasts, it was objected, that if the commoner could license, he could not do so without deed, and of that opinion was the whole court. (*Monk v. Butler*, Cro. Jac. 574. See *Ramsey v. Rawson*, 1 Vent. 18—25). It seems questionable whether a custom to demise by parol a right of common can be supported at law. (*Lathbury v. Arnold*, 1 Bing. 219; 8 Moore, 72. See *Rez v. Lane*, 1 D. & R. 78; 5 B. & Ald. 488).

Necessity of a deed to pass incorporeal rights and easements.

Where it appeared by entries in the court roll of a manor that the lord had granted a license to build a cottage on the waste, subject to the payment of an annual rent, and the license had been executed, and the cottage inhabited, Lord Ellenborough said—"A license is not a grant, but may be recalled immediately, and so might this license the day after it was granted." (*Her v. Inh. of Hornden-on-the-Hill*, 4 Maule & S. 565. See *Rez v. Inh. of Geddington*, 2 B. & C. 129; *Rez v. Inh. of Hagworthingham*, 1 B. & C. 634; *Rez v. Werblington*, 1 T. R. 241; *Rez v. Inh. of Stundon*, 2 Maule & S. 461.)

The right to be buried in a particular vault was held to be an easement capable of being created by deed only; and therefore a parol agreement not under seal was held to confer no right, though the plaintiff had paid a valuable consideration on the faith of its validity. (*Bryan v. Whistler*, 8 B. & C. 298; 2 M. & R. 318).

An agreement to let a party have a trench for water, though given for a valuable consideration, if there be no conveyance, is a parol license revocable at the will of the grantor. (*Fentiman v. Smith*, 4 East, 107). The right to a drain running through the adjoining land cannot be conferred by a parol license, but such interest can only be created by deed. In an action on the case for obstructing a drain, the plaintiff claimed right and title to the drain by virtue of a license granted to his landlords, their heirs, and assigns, to make the drain, and have the foul water pass from their scullery through the drain across the defendant's yard into another yard appurtenant to the premises in the plaintiff's occupation, it was held that the interest as declared upon by the plaintiff being in its nature freehold, and the license to support it being merely by parol and not by deed, the action was not maintainable. (*Hewlins v. Shippam*, 5 B. & C. 221; 7 D. & R. 783). So where the plaintiff sued for an obstruction of a certain drain which had been originally constructed at the plaintiff's expense on the defendant's land by his consent verbally given,—after it had been enjoyed some time, the defendant obstructed the channel, so that the water was prevented running as before; and it was contended on the part of the plaintiff that the license so given having been acted on, could not be revoked by the defendant; but the court held that the plaintiff was clearly not entitled to recover. With regard to the question of license, the court said "the case of *Hewlins v. Shippam* is decisive to show that an easement like the present cannot be conferred except by deed, nor has the plaintiff acquired any other title to the water." The mere entry into the close of another, and cutting a drain there cannot confer a right. (*Cocker v. Couper*, 1 Cr. M. & R. 418).

It seems to require a deed to create the right to have light and air come unobstructed from the land of one owner of land to the newly-opened window of an adjoining owner of a house. (*Bridges v. Blanchard*, 1 Ad. & Ell. 536; 3 Nev. &

M. 691; *Blanchard v. Bridges*, 4 Ad. & Ell. 195. See post, note on Lights).

Where a personal license of pleasure is granted, it extends only to the individual, and it cannot be exercised with or by servants, but if there is a *license of profit* and not of pleasure it may. (*Duchess of Norfolk v. Wisman*, Year Book, 12 Hen. 7, 25, and 13 Hen. 7, 13, pl. 2, cited 7 Mees. & W. 77. A parol license from A. to B. to enjoy an easement over A.'s land, is countermandable at any time whilst it remains executory; and if A. conveys the land to another, the license is determined at once, without notice to B. of the transfer, and B. is liable in trespass if he afterwards enters upon the land. A mere parol license to enjoy an easement on the land of another does not bind the grantor, after he has transferred his interest and possession in the land to a third person. In order to make the grantee a wrong doer in such a case he is not entitled to notice from the purchaser of the change of ownership in the soil, as that is a fact which he is obliged to know at his peril. (*Wallis v. Harrison*, 4 Mees. & W. 538)

There is a clear distinction between a license to do something which in its own nature seems intended to be permanent and continuing, and by which expense is incurred, and a license to do acts which consist in repetition, as to walk in a park, to use a carriage-way, to fish in the waters of another, or the like; in the latter case, if the license is countermanded, the party is but in the same situation as he was before it was granted; but in the former case the party to whom the license was granted may sustain a heavy loss by its being countermanded, and the party granting the license should expressly reserve the power of revoking the license after it had been carried into effect. (*Liggins v. Inge*, 7 Bing. 694). A plea of leave and license to erect and maintain a wall upon a given spot is not supported by proof of a license to erect only. (*Alexander v. Bonnin*, 6 Scott, 611; 4 Bing. N. C. 799; 1 Arn 337.)

Notwithstanding these authorities, it has been contended, that a beneficial privilege in land may be granted without deed, and, notwithstanding the statute of frauds, without writing. (7 Taunt. 384). In *Webb v. Paternoster*, Palm. 71, it is laid down, that the grant of a license to stack hay upon land does not amount to a lease of the land. This case arose before the statute of frauds. In *Wood v. Lake*, Say. 3, a parol agreement was held valid: the agreement was for liberty to stack coals on part of a close for seven years, and that during this term the person to whom it was granted should have the sole use of that part of the close upon which he was to have the liberty of stacking coals. (See 1 Sugd. V. & P. 138, 140, 10th ed.) In *Taylor v. Waters*, 7 Taunt. 384, an action was brought against the door-keeper of the Opera House, for denying admission to the plaintiff, who was the holder of a silver ticket, purporting to give him an entrance into that theatre for twenty-one years. It was objected that the right

claimed was an interest in land, and being for more than three years, could not pass without a writing signed by the party or his agent, authorized in writing. But it was held, that it was not an interest in land, but a license irrevocable to permit the plaintiff to enjoy certain privileges therein, and was not required to be in writing by the statute of frauds, though it extended beyond three years, and consequently might be granted without deed. In support of this opinion the cases of *Webb v. Paternoster*, *Winter v. Brockwell*, and *Wood v. Lake*, were relied on. In *Williams v. Morris*, 11 Law J. N. S. Exch., *Parke*, B. is reported to have said, that "considerable doubt had been thrown on the cases of *Webb v. Paternoster*, and *Taylor v. Waters*, by the very learned treatise of Messrs. Gale and Whalley on Easements," see p. 42. But a parol license to put a skylight over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window), cannot be recalled at pleasure, after it has been executed at the defendant's expense, at least not without tendering the expenses he had been put to; and therefore no action lays as for a private nuisance arising from the existence of such skylight. (*Winter v. Brockwell*, 8 East, 308). *Bailey*, J. said, "The case of *Winter v. Brockwell*, 8 East, 309, is distinguishable from *Hewlins v. Shippam*, 5 B. & C. 221. All that the defendant there did he did upon his own land: he claimed no right or easement upon the land of the plaintiff. The plaintiff claimed a right and easement against him, viz. the privilege of light and air through a parlour window, and a free passage for the smells of an adjoining house through defendant's area; and the only point decided there was, that as the plaintiff had consented to the obstruction of such easement, and had allowed the defendant to incur expense in making such obstruction, he could not retract that consent without reimbursing the defendant that expense. But that was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it. *Webb v. Paternoster*, *Wood v. Lake*, and *Taylor v. Waters* were not cases of freehold interest, and in none of them was the objection taken that the right lay in grant, and therefore could not pass without deed." (5 B. & C. 233). The court seems to have proceeded upon the same distinction in the following case—where the plaintiff's father gave the defendants leave, by parol, to lower the bank of a river and to erect a weir, whereby a part of the water which before flowed to the plaintiff's mill was diverted: it was held, that his son could not maintain an action against the defendants for continuing the weir, although his father, a few years after the license was given, had required them to raise up the bank and pull down the weir. (*Liggins v. Inge*, 7 Bing. 682; 5 M. & P. 712. See *Mason v. Hill*, 5 B. & Ad. 15). The court did not consider the object, and still less the effect, of the parol

license, to be the transferring from the plaintiff's father to the defendants any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment, on the part of the plaintiff's father, that he wanted such water no longer for the purposes of his mill; and that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir, which he then consented should be erected by the defendants; that after he had once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it was too late then to retract such consent, or to throw on those other persons the burthen of restoring matters to their former state and condition.

A parol agreement which is void under the statute of frauds, 29 Car. 2, c. 3, s. 4, may operate as a license so as to excuse what would otherwise be a trespass, as where the purchaser entered to take away a crop. (*Carrington v. Roots*, 2 Mees. & W. 257; *Crosby v. Wudsworth*, 6 East, 602). Goods which were upon the plaintiff's land were sold to the defendant; by the conditions of sale, to which the plaintiff was a party, the buyer was to be allowed to enter and take the goods: it was held, that after the sale the plaintiff could not countermand the license. And the defendant having entered to take, and the plaintiff having brought trespass, and the defendant having pleaded leave and license and a peaceable entry to take, to which the plaintiff replied *de injuriâ*, it was held, that the defendant was entitled to the verdict, though it appeared that the plaintiff had, between the sale and the entry, locked the gates and forbidden the defendant to enter, and the defendant had broken down the gates and entered, to take the goods. (*Wood v. Manley*, 11 Ad. & Ell. 34. See *Williams v. Morris*, 11 Law J. N. S. 126, Exch.; *ante*, p. 52).

It seems that the crown may, by parol, confer privileges over land so as to deprive itself of the power of treating the party exercising the privilege as a wrong doer; the actual possession of crown lands, under a parol license from the crown, entitles the party in possession to maintain trespass against a wrong doer. Generally speaking, trespass may be maintained by a person in the actual possession of land against a wrong doer, even where that possession may be wrongful as against a third person. (*Harper v. Charlesworth*, 4 B. & C. 590; 8 D. & R. 572).

4. OF RIGHTS OF WAY.

There are four kinds of ways (Co. Litt. 56 a.), 1, a foot-way—2, a horse-way, which includes a foot-way—3, a carriage-way, which includes both horseway and foot-way—4, a drut-way. Although a carriage-way comprehends a horse-way and a foot-way (*Davis v. Stevens*, 7 Carr. & P. 570); yet

Different kinds of ways.

it does not necessarily include a drift-way. (1 Taunt. 279). It is said, however, that evidence of a carriage-way is strong presumptive evidence of the grant of a drift-way. (Ibid).

A way may be granted for agricultural purposes only (*Reynolds v. Edwards*, Willes, 282), or for the carriage of coals only (*Ivesor v. Moore*, 3 Ld Raym. 291; 1 Salk. 15), or for the carriage of all other articles except coals. (*Marquis of Stafford v. Coyney*, 7 B. & C. 257; *Jackson v. Stacey*, Holt, N.P.C. 455). A reservation in a lease of a right of way on foot, and for horses, oxen, cattle and sheep, does not give any right of way to lead manure (*Brunton v. Hall*, 1 Gale & D. 207). Evidence of an user of a road with horses, carts, and carriages, for certain purposes, does not necessarily prove a right of road for all purposes, but the extent of the right is a question for the jury, under all the circumstances. (*Cowling v. Higginson*, 4 Mees. & W. 245. See *Ballard v. Dyson*, 1 Taunt. 279; *Jackson v. Stacey*, Holt, N.P.C. 455; *Allan v. Gomme*, 3 P. & Dav. 589, 590). There may be both an occupation way and a public highway over the same road, for it does not on becoming a highway cease to be an occupation way. (*Brownlow v. Tamlinson*, 1 M. & Gr. 484).

Highways.

A way of way may be either public or private. Ways common to all the king's subjects are called highways. (1 Vent. 189; 1 T. R. 570). A way leading to any market town, and common for all travellers, and communicating with any great road, is a highway; but if it lead only to a church, or to a house, or a village, or to the fields, it is a private way; whether it be a public or private way is a matter of fact, and depends much on common reputation. (1 Ventr. 189; Hawk. P. C. b. 1, c. 76, s. 1). The public may have a right to a road as a common street, although there be no thoroughfare, (*Rugby Charity v. Merryweather*, 11 East, 375; but see *Woodyer v. Haddon*, 5 Taunt. 125); or to a road terminating in a common. (*Rex v. Wandsworth*, 1 B. & Ald. 63). So it may be a highway, although it is circuitous. (*Rex v. Lloyd*, 1 Camp. 261; 3 T. R. 265); and although it is only occasionally used by the public, and does not terminate in any town, or in any other public road; (*Rex v. Inh. Wandsworth*, 1 B. & Ald. 63); and, on the contrary, it is not necessarily a public highway, although it does lead from one market town to another, or connect any two points by a line which might be advantageously used by the public, or is used by them under certain restrictions. (11 East, 376, n. (a)). On an issue whether or not certain land, in a district repairing its own roads, was a common highway, it is admissible evidence of reputation (though slight) that the inhabitants held a public meeting to consider of repairing such way, and that several of them, since dead, signed a paper on that occasion, stating that the land was not a public highway, there being at the time no litigation. (*Barracough v. Johnson*, 8 Ad. & El. 99; 3 Nev. & P. 233; see *Nicholls v. Parker*, 14 East, 331, n. to *Outram v. Morewood*).

It is a rule, that evidence of reputation must be confined to general matters, and not touch particular facts; the question in a cause being, whether a particular road admitted to exist was public or private, evidence was offered that a person, since deceased, had planted a willow on a spot adjoining the road, on ground of which he was tenant, saying, at the same time, that he planted it to show where the boundary of the road was when he was a boy. It was held, that such declaration was not evidence either as showing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest. (*The Queen v. Bliss*, 7 Ad. & Ell. 550).

If a man opens his land, so that the public pass over it continually, the public, after a user of a very few years, will acquire a right of way; and a party not meaning to dedicate a way, but only to give a license, should do some act to show that a license only is intended. The common course is to shut up the way one day in every year. (*The Trustees of British Museum v. Fianis*, 5 Car. & Payne, 460). The presumption of a dedication may be rebutted by proof of a bar having been placed across the street, soon after the houses forming the street were finished; though the bar was soon afterwards knocked down, and the way had been since used as a thoroughfare. (*Roberts v. Carr*, 1 Camp. N. P. C. 262, n.; and see *Lothbridge v. Winter*, Id. 263, n). But a gate being kept across a way is not conclusive that it is not a public way, as the way may have been granted to the public with the reservation of the right of keeping a gate across it to prevent cattle straying. (*Devies v. Stephens*, 7 Carr. & P. 570; *Rez v. Bliss*, 2 Nev. & P. 464).

Dedication of
ways to the
public.

A permissive user of a way is not inconsistent with a right to resume the way. In determining whether or not a way has been dedicated to the public, the proprietor's intention must be considered. If it appear only that he has suffered a continual user, that may prove a dedication; but such proof may be rebutted by evidence of acts showing that he contemplated only a license resumable in a particular event. Thus, where the owner of land agreed with an iron company, and with the inhabitants of a hamlet repairing its own roads, that a way over his land in such hamlet should be open to carriages, that the company should pay him 5s. a year and find cinder to repair the way, and that the inhabitants of the hamlet should lead and lay down the cinder, and the way was thereupon left open to all persons passing with carriages for nineteen years, at the end of which time a dispute arising, the passage was interrupted, and the interruption acquiesced in for five years: it was held, that the evidence showed no dedication, but a license only, resumable on breach of the agreement. (*Barnaclough v. Johnson*, 8 Ad. & Ell. 99; 3 Nev. & P. 233.) A dedication to the public may be presumed from a shorter time than is necessary to establish a right of possession to land; and it has been presumed from a user by the public during a period of eight years, and even six years. (*Rugby Charity v. Merryweather*, 11

East, 376). So where a court on one side of a public street in London was left open to the public, and occasionally used as a communication from one part of the street to another, a dedication to the public was presumed. (*Rex v. Lloyd*, 1 Camp. 268; 3 T. R. 265). Where a canal company originally erected a bridge for the use of the tenants of particular lands, but for ten years the public had crossed it without interruption: it was held, that it was properly left to the jury to say, whether the company intended or not to dedicate it to the public, and the jury having so found, the court, in the absence of any misdirection in law, refused to interfere with such finding. (*Surrey Canal Company v. Hall*, 1 Scott, N. S. 264; 1 Mann. & G. 382. See *Rex v. Wright*, 3 B. & Ad. 681.) A user by the public of an open strand or waste does not necessarily lead to the inference that the owner of the soil has abandoned his right to it, and given it to the public. Although the dedication of a way to the public may be partial or limited as to the sort of way, (as to a horseway, &c.) yet there cannot be a qualified dedication to the public, subject to a power of resumption to the grantor, for that would be the reservation of a right inconsistent with the dedication to the public. (*Fitzpatrick v. Robinson and others*, 1 Hudson & Brook, 585. See *Blundell v. Catterall*, 5 B. & Ald. 315; *Lade v. Shepherd*, 2 Str. 1004; *Barraclough v. Johnson*, 3 Nev. & P. 233.) There can be no dedication to the public of land as a highway, with a reservation of a right of making cuts through the land when wanted for the purpose of drainage. (*Rex v. Leake*, 2 Nev. & M. 595; 5 B. & Ad. 469.) It seems that the setting out a road under a local act, by commissioners, for the use of particular persons, which in fact has been used by the public for many years, is not sufficient evidence of a dedication, without evidence of acquiescence on the part of the parish. (*Rex v. St. Benedict*, 4 B. & Ald. 447. See *Campbell v. Wilson*, 3 East, 294. See *Rex v. Miller*, 1 B. & Ad. 32; *Rex v. Edge Lane*, 6 Nev. & M. 81).

Acts of
tenants.

A tenant for ninety nine years cannot dedicate a way to the public, without the consent of the owner of the fee; and permission by such tenant will not bind the landlord after the expiration of the term. (But see ante pp. 25—27. *Wood v. Veal*, 5 B. & Ald. 474. See 4 B. & Ad. 75; *Reg. v. Bliss*, 7 Ad. & Ell. 555; *Barraclough v. Johnson*, 8 Ad. & Ell. 104). In *Wood v. Veal*, (5 B. & Ald. 454), the public had used a way over the locus in quo as long as could be remembered; but the land had been under a lease for ninety-nine years during the whole time, and it was left as a question for the jury, whether there had been a dedication to the public before the term commenced, for if not, there could be no dedication except by the owner of the fee, and the lease explained the user as not being referable to a dedication by such owner. Yet there was strong evidence to show that the landlord could not have been ignorant of the user. (8 Ad. & Ell. 104. See *Rex v. Lloyd*, 1 Camp. 260; *Baxter v. Taylor*, 1 Nev. & M. 13.) But where a lease was granted of certain ground to be a pas-

age for fifty-six years, evidence of the user of the road by the public three or four years after the expiration of the lease was held to be evidence of a gift to the public. (*Rex v. Hudson*, Str. 909). Where a public footway over crown land was extinguished by an inclosure act, but used for twenty years afterwards by the public, it was held not to be a dedication to the public, as it did not appear to have been with the knowledge of the crown. (*Harper v. Charlesworth*, 4 B. & Cr. 574). However, after a long lapse of time, and a frequent change of tenants, and from the notorious and uninterrupted use of a way by the public, it may be presumed that the landlord had notice of the way being used, and that it was so used with his concurrence. (*Rex v. Barr*, 4 Camp. N. P. C. 16). And notice to the steward is notice to the landlord. (*Id.*; *Doe d. Foley v. Wilson*, 11 East, 56). It seems that there may be a partial dedication of a highway to the public; but where the owner of lands had, on the making a new road over his property, given his consent thereto on condition of its being used for coal carts, it was held, that if even by law there could not be a restriction to a public way, the grant amounted only to a license, which was revocable, and that, after notice, a person using such way with coal carts would be a trespasser. (*Marquis of Stafford v. Coyne*, 7 B. & Cr. 257. See *Roberts v. Carr*, 1 Camp. 262; *Rex v. Inh. of Northamptonshire*, 2 Maule & S. 262.) Where there has been a public king's highway, no length of time during which it may not have been used will prevent the public from resuming the right, if they think proper. (*Rex v. Inh. of St. James's*, 2 Sel. N. P. 1352, 8th ed. See 2 B. & Ald. 662; *Rex v. Mountague*, 4 B. & C. 598). As to the law of Highways, see statute 5 & 6 Wm. 4, c. 50, with notes by *Shelford*, and *Burn's Justice*, by *Chitty*, iii. Highways.

The freehold of the highway is in the owner of the freehold of the soil, although the king and his subjects may pass and repass the soil, at their pleasure. (2 Inst. 705; *Sir John Lade v. Shepherd*, 2 Str. 1044). The owner of the soil is entitled to all profits, trees, and mines upon or under the highway. (1 Roll. Abr. 392; 1 Burr. 143). In the 82nd section of the stat. 5 & 6 Wm. 4, c. 50, there is a saving of mines to the owner of lands, taken for widening narrow roads. The soil does not vest in turnpike trustees, who have only the control of the highway, without a special clause for that purpose. (*Davison v. Gill*, 1 East, 69. See also *Rex v. Mersey Navigation*, 9 B. & C. 95; *Rex v. Thomas*, Id. 114). The owner of land adjoining only one side of the highway may maintain an action of trespass against one who suffers his cattle to depasture along the highway, (*Dovaston v. Payne*, 2 H. Bl. 527; *Stevens v. Whistler*, 11 East, 51); or an action for ejectment of land over which there is a public right of way. (*Goodtitle v. Alker*, 1 Burr. 133; *Doe v. Wilkinson*, 3 B. & C. 413. And see *Scales v. Pickering*, 4 Bing. 448). The presumption of law is, that waste land adjoining a road belongs

to the owner of the soil of the adjoining inclosed land, and not to the lord of the manor, (*Steel v. Prickett*, 2 Stark. 463; *Seones v. Morrell*, 1 Beav. 251); whether such owner be a freeholder, copyholder, or leaseholder. (*Doe d. Pring v. Pearsey*, 7 B. & C. 304; S. C. 9 D. & R. 908). The right to land adjoining either side of the road extends to the centre. (*Cooke v. Green*, 11 Price, 736). But it seems that roads set out under an inclosure act do not by presumption of law belong to the adjoining owners. (*Re v. Edmonton*, 1 M. & Rob. 24; *Re v. Wright*, 3 B. & Ad 681). Where the herbage of a road becomes vested by the general inclosure act, 41 Geo. 3, c. 109, s. 11, in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietor. (*Re v. Hatfield*, 4 Ad. & Ell. 156). But such presumptive right of the owner of the adjoining land may be repelled by evidence of acts of ownership by the lord of the manor. (*Anon. Lofft*, 358). Though *prima facie* the presumption is, that a strip of land lying between a highway and the adjoining close, belongs to the owner of the close; as the presumption also is, that the highway itself, *ad medium filum viæ* does, such presumption is confined to that extent, for if the narrow strip be contiguous to, or communicate with, open commons or larger portions of land, the presumption is either done away, or considerably narrowed; for the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them. (*Grose v. West*, 7 Taunt. 39; *Headlam v. Hedley*, Holt, N. P. C. 463). Upon a question whether a piece of waste land, between a highway and inclosures, belonged to the plaintiff, the owner of the adjoining inclosure, or to the lord of the manor, it was held that the lord might give evidence of grants by him of the waste between the road and the other inclosures of other persons at a distance from the spot claimed by the plaintiff, provided such evidence were confined to the road which passed by the spot claimed by the plaintiff. (*Doe d. Barrett v. Kemp*, 7 Bing. 332; 5 Mann. & R. 173; 2 Bing. N. S. 102. See *Stanley v. White*, 14 East, 332). In a case where it was contended that balks are by presumption of law the property of the owner of the adjoining soil, *Taunton J.* said, "Is there such a presumption? the common instance of a presumption of that kind is in the case of roads. Balks are strips of land lying between lands which are private property; if the presumption be as stated, it is at any rate not so familiarly known." (*The Bailiffs of Godmanchester v. Phillips*, 4 Ad. & Ell. 560).

How private ways may be claimed.

A private way is a right which one or more persons have of going over the land of another. This may be claimed either by grant, prescription, custom, by express reservation, as necessarily incident to a grant of land, or by virtue of an inclosure act. (*Selw. N. P.* 1241). A person having a private way over the land of another cannot, when the way is become impassable by the overflowing of a river, justify going on the adjoining land, although such land, as well as the land over

which the way runs belongs to the grantor of the way; (*Taylor v. Whitehead*, 2 Dougl. 476; 4 Maule & S. 387;) but if a highway be impassable, the public are entitled to pass in another line. (*Id.*)

1. *By Grant.*—A way may be claimed by grant, as where A. grants that B. shall have a way through a particular close, (*Com. Dig. Chimin*, (D. 3); so a covenant that another shall have and use a way amounts to a grant. (*Holmes v. Sellar*, 3 Lev. 305.) And if a man seised of Whiteacre and Blackacre uses a way through the latter to the former, and afterwards grants Whiteacre, with all ways, &c., such right of way passes to the grantee. (*Staple v. Haydon*, 6 Mod. 3). Where a lease of premises described them as abutting on an intended way, thirty feet wide, not then set out, the soil of which was the property of the lessor: and the lessee granted an underlease, describing the premises as abutting on an intended way, without specifying the breadth; it was held that the sub-lessee was entitled to a *convenient* way only. (*Harding v. Wilson*, 3 B. & Cr. 96.) Where certain houses, with a piece of ground, part of an adjoining yard, were leased to a tenant, together with all ways with the said premises or any part thereof *used or enjoyed before*; and at the time of the lease granted the whole of the yard was in the occupation of one person, who had always used and enjoyed a right of way to every part of that yard: it was held that the lessee was entitled to such right of way to the part of the yard demised to him. (*Kooystra v. Lucas*, 5 B. & Ald. 830; S. C. 1 Dowl. & Ry. 506.) If a close is conveyed, *with all ways thereto belonging and appertaining*, the easement will not pass, except in the case of a way of necessity, where such right of way would pass without any words of grant of ways. (*Grymes v. Peacock*, Bulst. 17.) But a way not strictly appurtenant will not pass by those words in a conveyance, unless the parties appear to have intended to use them in a sense larger than their ordinary legal sense. (*Barlow v. Rhodes*, 1 Crompt. & Mees. 439). The words "belonging and appertaining" are synonymous. (*Id.* 448). Where an *underlease* described the ground demised and the ways granted by the words "all ways thereto appertaining," a road over the soil of the original lessor was held not to pass by those words, although it might by the words "heretofore used." (*Harding v. Wilson*, 2 B. & Cr. 96.) Where the plaintiff claimed a right of way over the defendant's soil, and it appeared that in the defendant's lease, granting him all ways, without exception or qualification, there was a covenant for contributing with other occupiers of the lessor's property to the keeping up paths, &c. used in common by them, and it was proved that the plaintiff had always used the path in question, and that there was no other path to which the covenant could apply, it was held, that it might be inferred that the defendant took the soil demised to him, subject to the plaintiff's right of way. (*Oakley v. Adamson*, 8 Bng. 356; S. C. 1 Moore & Scott, 510.) In 1728,

land was let on a building lease, which expired at Lady-day 1824. In 1819, plaintiff, by virtue of a demise from an under-lessee, which expired in 1820, was in possession of a house erected on a part of this land, and under that demise exercised, as all his predecessors had done for more than thirty years, a right of way over a passage on one side of his house as necessary for the use and enjoyment thereof, particularly for repairing the eastern side: the under-lessee's interest expired in 1822; defendant was in possession of the soil of the passage by virtue of an assignment, in 1791, of the lease of 1728. In 1819, the party possessed of the reversion expectant on the lease of 1728 demised to the plaintiff the house of which he was in possession as above for fifty-seven years and a half, to hold from Lady-day 1824, together with all the appurtenances to the same belonging, subject to a covenant for repairs. In 1822, the reversioner demised the soil of the passage to defendant for sixty-one years, to hold from Lady-day 1824: held, that under the demise of 1819 plaintiff was entitled to a right of way over defendant's passage. (*Hinchcliffe v. Earl Kinnoul*, 5 Bing. N. C. 1; 6 Scott, 650.) In an action for obstructing a way, granted by a lease from the defendant to the plaintiff, the judge will receive evidence of the state of the premises at the time of granting the lease, and will then put a construction on the lease as to the line along which the way is granted; but he will not receive evidence of the declarations or acts of the parties, either before or after the lease, as showing where the way is or was intended to be; but if it be uncertain on the words of the grant which of two ways is intended, the judge will receive parol evidence to show which the grantor meant to grant. (*Osborn v. Wise*, 7 Car. & P. 761.) Where a testator being seised in fee of the adjoining closes A. and B., over the former of which a way had immemorially been used to the latter, devised B. with the appurtenances; it was held that the devisee could not, under the word "appurtenances," claim a right of way over A. to B., as no new right of way was thereby created, and the old one was extinguished by the unity of seisin in the devisor. (*Whalley v. Thompson*, 1 Bos. & Pull. 371). An existing way will pass by the word "appurtenances" (Id.) Where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and after such extinguishment, or during such suspension of the right, the way cannot pass as an *appurtenant* under the ordinary legal sense of that word. In the case of an unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed with the land" which forms the subject matter of the conveyance. (*James v. Plant*, 4 Ad. & El. 761.) Estates A. and B., formerly

distinct, became vested in coparceners. Before that time a right of way had been enjoyed from A. over B., and after the unity of seisin the way always continued to be used. The parceners, for the purpose of making partition, conveyed to a releasee to uses the messuages, tenements, lands, &c. (of which the estates consisted), and all houses, outhouses, ways, easements, &c. to the said several messuages or tenements, lands, &c. belonging or appertaining or therewith usually held, used, occupied, or enjoyed; to have and to hold the messuages, &c. called A., with the buildings, lands, &c. thereunto belonging, and their appurtenances, to the releasee, to the use of S. in fee; *habendum*, as to estate B., in similar terms; with respect to the parcels, to the releasee to his own use in fee, in order that he might become tenant to the *præcipe* in a recovery: it was held, that the deed sufficiently showed an intention that a right of way (which was admitted to have been used up to the time of the deed) from the high road over B. to A. and back, for the convenient use of A. by the occupiers of A. should pass to the uses limited as to A.; that by the word "appurtenances" in the *habendum* as to A., interpreting that clause with reference to the other parts of the deed, the way in question did pass; and that the releasee to uses, having no estate in A., interpreting that clause with reference to the other parts of the deed, the way in question did pass; and that the releasee to uses, having no estate in A., had not such seisin of the soil as would extinguish the right of way by unity of seisin. (*James v. Plant*, 4 Ad. & El. 749; 2 Nev. & M. 517).

Nothing is more clear than that under the word "appurtenances," according to its legal sense, an easement which has become extinct, or which does not exist in point of law, by reason of unity of ownership, does not pass. (*Grimes v. Pascock*, 1 Bulst. 17; *Saundays v. Oliff*, Sir T. Moore, 467; *Whalley v. Thompson*, 1 Bos. & P. 371; *Clements v. Lamheri*, 1 Taunt. 205; and *Barlow v. Rhodes*, 1 Cramp. & Mees. 439; *ante*, p. 59.)

If the grantor wish to revive or to create such a right, he must do it by express words, or introduce the terms "therewith used and enjoyed;" in which case easements existing in point of fact, though not existing in point of law, would vest in the grantees. (Per J. Parke, J., 2 Nev. & Mann, 522). Commissioners of partition may award a right of way over the lands of one party to the lands of another party interested in the partition. (*Lister v. Lister*, 3 Y. & Coll. 540).

A right of way or a right of passage for water (where it does not create an interest in the land) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which it seems cannot,) otherwise than by deed. (5 B. & Cr. 229.

Presumption
of grants of
way.

See *ante*, p. 49—51.) Grants of rights of way are presumed from long enjoyment where its commencement cannot be accounted for, unless a grant has been made. (5 B. & Ald. 237.) The uninterrupted enjoyment of a right of way for twenty years, in the absence of evidence that it had been used by leave or favour, or under a mistake, was held sufficient to leave to a jury to presume a grant, although the road in question had been extinguished about twenty-six years before, under the award of the commissioners of an inclosure act. (*Campbell v. Wilson*, 3 East, 294.) So where there had been an absolute extinguishment of a right of way for many years by unity of possession, but the way had been used for thirty years preceding an action for its obstruction, the jury were directed to presume a grant from the defendant. (*Keymer v. Summers*, Bull. N. P. 74, cited 3 T. R. 157.) Where a defendant pleaded a grant of a right of way by deed subsequently lost, and the plaintiff in his replication traversed the grant, and at the trial there was conflicting testimony as to the uninterrupted user of the way, a direction by the judge to the jury to find for the defendant, if they thought he had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, and to find for the plaintiff if they thought there had been no way granted by deed, was held right. (*Livett v. Wilson*, 3 Bing. 115.) Though an uninterrupted possession for twenty years and upwards be a bar to an action on the case, yet the rule must be taken with this qualification, that the possession was with the acquiescence of the person seized of an estate of inheritance. The mere knowledge of the tenant is not sufficient, otherwise he might collude to the prejudice of his landlord. But presumptions are sometimes made against the owners of lands, during the possession and by the acquiescence of their tenants, in cases of rights of way and of common, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own. (*Daniel v. North*, 11 East, 372.) In every case where the party claiming relies on his want of possession, the question whether he knew or not of the enjoyment, is to be determined by the circumstances of the case, and may very properly be left for the consideration of the jury. (*Dawson v. Duke of Norfolk*, 1 Price, 247; *Gray v. Bond*, 2 Brod. & Bing. 667.) The user of a way during the occupation of tenants does not bind the landlord, unless he was aware of it; but if the user has been for a great length of time, it may be presumed that he was aware of it. (*Davies v. Stephens*, 7 Carr. & P. 570.) The knowledge of the owner of the land and his acquiescence may be presumed from circumstances. Thus where the lessees of a fishery had publicly landed their nets on the shore at A. for more than twenty years, and had, at various times, dressed and improved the landing-place, and both the fishery and the landing-place originally belonged to one person, but no evidence was offered to

show that he or those who under him owned the shore at A. law of the landing nets by the lessees of the fishery; it was held, that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery by some former owner of the shore at A. (*Gray v. Bond*, 2 Brod. & Bing. 667; S. C. 5 Moore, 527.)

2. *By Prescription*.—A private way may also be claimed by prescription; as that a man is seised in fee of a certain messuage, and that he, and all those whose estate he has in the same messuage, have from time immemorial had a way (describing it as the case may be) from — to —. A way being only an easement, and not an interest, should not be laid as appendant or appurtenant. (Yelv. 159.) Where a particular tenant relies on a prescriptive right, he must, before the act 2 & 3 Will. 4, c. 71, have set forth the seisin in fee of the owner, and then have traced his own title from the owner of the fee. (2 Salk. 562; Com. Dig. Chimin, (D. 2.)). Unity of possession of the land to which the way is claimed as appurtenant, with the land over which the way lies, extinguishes the way; for it is an answer to the prescription, and the way is against common right (1 Roll. Abr. 935; 3 T. R. 157; 5 East, 295; *Whalley v. Thomson*, 1 Bos. & Pull. 371; *Buckby v. Coles*, 5 Taunt. 311.) But where in trespass *quare clausum fregit*, defendant prescribed in a *que estate* for a right of way over the *locus in quo*, and it appeared that the defendant's land had, within fifty years, been part of a large common, and afterwards included under the provisions of an act of parliament, and allotted to the defendant's ancestor, it was held, that notwithstanding this evidence the right claimed by the defendant's plea might in law exist; and the jury having found that in fact it did exist, the court refused to disturb the verdict. (*Colling v. Johnson*, 9 B. & Cr. 933.) If the lessor enjoy a prescriptive right of way, or any other easement, by virtue of the demised premises, such right will pass to the tenant for life or years. Before the act 2 & 3 Will. 4, c. 71, (see *ante*, s. 5, pp. 16—24,) the only distinction between a tenant for years and a tenant for life was, that the former in pleading could not presume in his own right; but he must have asserted the right through his landlord, or the owner of the freehold. (*Cantrell v. Stephens*, Styl. 300; *Dawney v. Cashford*, Carth. 432.)

3. *By Custom*.—A custom that every inhabitant of such a vill shall have a way over such land, either to church or market, is good; because it is only an easement, but not a profit. (6 Rep. 60 b; Co. Litt. 110 b; Cro. Eliz. 180. See 2 H. Bl. 383.)

4. *By Express Reservation*.—A right of way may be claimed by express reservation; as where A. grants lands to another, reserving to himself a way over such land. (1 Roll. Abr. 109, pl. 45; Com. Dig. Chimin, (D. 2.); and see *Earl of Cardigan v. Armitage*, 2 Barn. & Cr. 197; 3 Dowl. & R. 414.)

5. *For Necessity*.—As a right of way may be created by an

express grant, so it may also arise by an implied grant, where the circumstances are such that the law will imply such grant. This right of way has been commonly termed a way of necessity, but it is in fact only a right of way by implied grant; for there seems to be no difference where a thing is granted by express words, and where it passes as incident to the grant by operation of law. (1 Wms. Saund. 323, note. See 4 Maule & S. 387.) A purchaser of part of the lands of another has a way of necessity over the vendor's other lands, if there be no convenient way adjoining; so if a man having four closes lying together sells three, and reserves the middle close, to which he has no way but through one of those sold, although he did not reserve any way, yet he shall have it as reserved to him by the law. (*Clark v. Cogge*, Cro. Jac. 170; *Jordan v. Attwood*, Owen, 121.) A way of necessity passes by a grant or lease of the land, without being expressed; for the land cannot be used without a way. (*Beaudely v. Brook*, Cro. Jac. 189.) A conveyance of land by a trustee, to which there is no access but over the trustee's land, passes a right of way. (*Howton v. Frearson*, 8 T. R. 50.) So if the owner of two closes having no way to one of them but over the other, part with the latter without reserving a right of way, it will be reserved to him by operation of law. (*Id.*) Where there is a private road through a farm, the parson may use it for carrying away his tithe, though there is another public way equally convenient. (*Cobb v. Selby*, 6 Esp. 103.) Unless a tithe owner has a right of way to carry tithe off titheable lands within the parish by grant of the owner of the fee, or by prescription, he has, *prima facie*, only a right to use such road for that purpose as is used at the time by the occupier to carry off the other nine tenths; and if he has any further right to use any other way from the particular close, because used by the occupier for other agricultural purposes, or for more convenient use of the close, though not for the purpose of carrying off the crop, that right can only exist while such way continues, without being stopped up by the occupier. (*James v. Dods*, 2 C. & M. 266; 4 Tyrw. 101.) A way of necessity cannot be pleaded generally, without showing the manner in which the land over which the way is claimed is charged with it. (*Bul-lard v. Harrison*, 4 Maule & S. 387. See 1 Wms. Saund. 323, n. 6.) A way of necessity exists after a unity of possession, which would otherwise have extinguished the way, and after a subsequent severance. (*Buckley v. Coles*, 5 Taunt. 311.) A way of necessity is limited by the necessity which created it; and when such necessity ceases, the right of way also ceases; therefore if, at any subsequent period, the party formerly entitled to such way can approach the place to which it led by passing over his own land, by as direct a course as he would have done by using the old way, the latter will cease to exist. (*Holmes v. Goring*, 2 Bing. 76; 8 C. 9 Moore, 166; *Reynolds v. Edwards*, Willes, 282.)

The grantee of a way has a right to repair it, as incident to the grant (Com. Dig. Chimin, (D. 6); Godb. 53: *Gerrard v. Cook*, 2 Bos. & P. N. R. 109, Vin. Abr. Incidents, (A)), and the grantor is not bound to repair (Com. Dig. Chimin, (D. 6.)) unless by express stipulation or prescription. (1 Saund. 322, a. n.; *Rider v. Smith*, 3 T. R. 766). The grantee of a private way is to make it. (*Osborn v. Wise*, 7 Car. & P. 764). By common law he who has the use of a thing ought to repair it, unless the grantor has bound himself to do so. (*Taylor v. Whitehead*, 1 Doug. 720; *Pomfret v. Ricroft*, 1 Wms. Saund. 322, b.)

A. granted to B., his heirs and assigns, occupiers of certain houses abutting upon a piece of land about eleven feet wide, which divided those houses from a house then belonging to A., the right of using the said piece of land as a foot or carriage way, and gave him "all other liberties, powers, and authorities incident or appurtenant, needful or necessary to the use, occupation, or enjoyment of the said road, way, or passage:" it was held, that under these words B. had a right to put down a flagstone in this piece of land in front of a door, opened by him out of his house into this piece of land. It was observed by *Chambre J.*, that the nature of the thing was material in considering the effect of the words. The way was granted for the occupation of a dwelling house, and the grantee ought to have every thing needful for the occupation of his dwelling house, he ought therefore to have the opportunity of repairing the way in such a manner, that it should not be wet or dirty, when he or his family or his visitors enter. If any inconvenience had been occasioned to the grantor, it might make a difference; but that was not the case here, nor was it to be feared that any right could hereafter be set up in respect of the soil in consequence of this stone having been put down, for the precise extent of the road was pointed out. (*Gerrard v. Cook*, 2 Bos. & P. N. R. 109.)

Under the 9th section of the general inclosure act, 41 Geo. 3. c. 109, a road continued as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in special sessions to be fully completed and repaired, before the inhabitants of the district are liable to repair. (*Res v. Inhabit. Hatfield*, 4 Ad. & El. 156). Parishes are not liable to the repair of any road or occupation way made at the expense of an individual, or of any roads to be set out as a private driftway or horseway in any award of commissioners, unless they are made to the satisfaction of the surveyor of the highways and of two justices of the peace, 5 & 6 Wm. 4. c. 50, s. 23. This provision is not retrospective in respect of roads completely public by dedication at the time of the passing of the act (31st Aug. 1835); but applies to roads then made and in progress of dedication. (*Reg. v. Westmark*, 2 M. & Rob. 306.)

It does not appear to have been decided what is the pre- Right of way,
how lost.

cise period requisite to extinguish a right of way by mere non-user. Lord Tenterden said, "one of the general grounds of a presumption is, the existence of a state of things, which may most reasonably be accounted for, by supposing the matter presumed. Thus the long enjoyment of a right of way by A. to his house or close, over the land of B., which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of the land; and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may reasonably be accounted for, by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter a release of it, is presumed. (*Doe d. Pentland v. Hilder*, 2 B. & Ald. 791). *Littledale, J.*, expressed a similar opinion. He said according to the present rule of law, a man may acquire a right of way in a right of common (except indeed common appendant) upon the land of another by enjoyment; after twenty years' adverse enjoyment, the law presumes a grant made before the user commenced by some person who had power to grant; but if the party who had acquired the right by grant ceased for a long period of time to make use of the privilege granted to him, it may then be presumed that he has released the right. It is said, however, that as he can only acquire the right by twenty years' enjoyment, it ought not to be lost without disuse for the same period; and that as enjoyment for such a length of time is necessary to found a presumption of a grant, there must be a *similar non-user* to raise a presumption of a release, and this reason may perhaps apply to a right of common or of way. (*Moore v. Rawson*, 3 B. & C. 339).

It was laid down in another case, that where a right of way has been once established by clear evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in; an unsuccessful attempt on the part of the occupiers of the land, over which the way ran, from time to time, to interrupt such right, will not be sufficient to get rid of it. (*Harvie v. Rogers*, 3 Bligh, N. S. 444—7. See 12 Ves. 265.) It will be observed that by the 4th section of the statute 2 & 3 Will. 4, c. 71, (*ante*, p. 13,) no act is to be deemed an interruption, unless the same shall have been acquiesced in for one year after the party interrupted shall have notice thereof, and of the person making or authorizing the same to be made. A prescriptive right of way to a public towing path on the banks of a navigable tide-river, is not destroyed by that part of the river adjoining the towing path having been converted by statute into a floating harbour, although such towing path was thereby subject to be used at all times of the tide; whereas before it was only used at those times when the tide was sufficiently high for the purposes of navigation; and such prescription is not destroyed by a clause

in the statute whereby the undertakers of the work were authorized to make a towing path over land, comprising the towing path in question, on paying a compensation to the owner of the mill. (*Rex v. Tippet*, 3 B. & Ald 198).

There does not appear to be any direct authority to show whether, if the use of a place, to and from which a way is by express words reserved or granted, be completely changed, the way can still be continued to be used. It has been held, that if a man has a right of way to a close called A., he cannot justify using the way to go to A. and from thence to another close of his own adjoining to A. (1 Roll. Abr. 391, pl. 3; *Howell v. King*, 1 Mod. 191; *Lawton v. Ward*, 1 Ld. Raym. 75; and 1 Latw. 111). It seems, however, that an alteration of the substance of the thing, in respect of which the right is claimed in such a manner as to occasion any injury or prejudice to the person who supplies the easement, will prevent the acquisition of any additional right of easement. (See *Lattrell's Case*, 4 Rep. 86). In trespass *quare clausum frangit* it appeared that B., being the owner of the *locus in quo*, and also of certain other land with houses and a stable, loft and chaisehouse, conveyed to A. a part of the premises, consisting of a house and land comprehending the *locus in quo*, reserving to himself, his heirs, &c., occupiers for the time being of a messuage (not conveyed) a right of way and passage over the *locus in quo* to a stable and loft over the same, and the space or opening under the loft and then used as a woodhouse, and to the chaisehouse standing on the side of the *locus in quo* (the stable, loft, woodhouse, and chaisehouse not being conveyed), and also the use of the *locus in quo* in common with A., his heirs, &c., and their tenants for the time being, it being expressed to be the intent of the parties that the whole of the yard comprehending the *locus in quo* should be open and undivided, as the same then was, and be used in common by the occupiers of both messuages as the tenants thereof had been accustomed theretofore to use them; afterwards B. built a cottage on the site of the opening under the loft: it was held, 1. That the reservation of the use of the *locus in quo* did not authorize B. to use it for the purpose of passing to the cottage. 2. That the reservation of the right of way was not limited to a right of passage to the space so long as it was used as a woodhouse; but gave a way generally to the space so described while it was open. 3. But that B. was not entitled to use that way for the purpose of passing to a newly-erected cottage on that space. (*Allan v. Gomme*, 11 Ad. & El. 759; 3 P. & Dav. 581). *Denman*, C. J. in giving judgment said that the case depended upon the legal effect of the reservation. * Upon that we are of opinion that, under the terms of this deed, the defendant is not entitled to have the right of way claimed, but that he is to be confined to the use of a way to a place which should be in the same predicament as it was at the time of the making the deed. We do not mean to say that

Loss of right by alteration.

he could only use it to make a deposit of wood there, for we consider the words "now used as a woodhouse," merely used for the ascertaining the locality and identity of the place called a space or opening under the loft, and we think he might have the benefit of the way to make a deposit of any articles, or use it in any way he pleased, provided it continued in the state of open ground; but we think that he could only use it for purposes which were compatible with the ground being open, and that if any buildings were erected upon it, it was no longer to be considered as open for the purpose of this deed. Suppose that this piece of ground, instead of being a small quantity, had been a field of many acres, and that B. had sold off the part above mentioned to the plaintiff, reserving to himself this right of way to the land, calling it a field then in pasture or in corn, and had subsequently filled the land with small cottages, or had built a factory or established gas works, it surely never could be contended that it was the meaning of either of the parties to the deed that there should be a right of way over the yard to those buildings. The supposed intention of the parties cannot indeed be considered; and it can only be determined by the instrument itself what their intention was." (*Allan v. Gomme*, 3 Per. & D. 591; 11 Ad. & Ell. 759; see *Osborn v. Wise*, 7 Carr. & P. 761).

Stopping
ways under
inclosure acts.

By the 10th section of the General Inclosure Act, 41 Geo. 3, c. 109, the commissioners are directed to set out private roads; and by the 11th section of that act it is declared that all roads, ways, and paths, over, through, and upon such lands and grounds, which shall not be set out, shall be extinguished. But where a private inclosure act does not vary the terms of the above act, if the commissioners in their award do not notice a road running over the inclosed lands, it is, by the operation of that act, extinguished, and the proprietor of the lands over which it runs may stop it up. Thus it was held that a plaintiff, to whom an allotment was made by a commissioner under an inclosure act, of land over which the defendants had a private right of way before the passing of the act, but which was noticed or described amongst those set out by the commissioner, might justify the stopping up of such way, although the award contained no declaration that the road in question was stopped up. (*White v. Reeves*, 2 B. Moore, 23). As to the construction of local inclosure acts giving powers to stop up roads, see *Logan v. Burton*, 5 B. & Cr. 513; S. C. 3 Dowl. & Ry. 299; *Harber v. Rand*, 9 Price, 58; *Rex v. Inh. of Hatfield*, 4 Ad. & Ell. 156.) Where commissioners had no power under the particular or general inclosure act to stop up a way over old inclosures, but did not by their award set out any new way over the waste lands inclosed, it was held that an old footway passing from a public highway over wastes to old inclosures, into another public highway, still existed as it formerly did over the waste lands, and over the old inclosures into the public highway. (*Thackeray v. Seymour*, 1 Cr. & Mees. 18).

It is an elementary rule in pleading, that when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation. Thus, in a case very familiar, if a trespass be justified by a plea of highway, the pleader never states how the *locus in quo* became a highway; and if the plaintiff's case is that the *locus in quo*, by an order of justices, award of inclosure commissioners, local act of parliament, or any other lawful means, had ceased to be such at the time alleged in the declaration, he simply puts in issue the fact of its being a highway at that time, without alleging the particular mode by which he intends to show, in proof, that it had before then ceased to be such. (*Williams v. Wilcox*, 8 Ad. & Ell. 331). In all cases for disturbance of a way, the obstruction ought to be charged in the pleadings in the thing itself to which the party has a right, and if charged generally, the declaration would be bad. Much more then, when the mode of the obstruction is stated and that not in the thing where the right is claimed. (*Tebbett v. Selby*, 1 Nev. & P. 717.) Trespass *quare clausum fregit*, with abutments. Plea, a right of way. New assignment, trespass *extra viam*; plea, that before, &c., the plaintiff had wrongfully stopped up the way in the former plea mentioned, wherefore the defendant did necessarily go a little out of the said highway *quæ est eadem*. Replication, *de injuriâ*. At the trial it appeared that there was a public footway over the plaintiff's close, which the plaintiff admitted, and another footway which the defendant claimed as public, but which the plaintiff had stopped up, and it was proposed to try the question as to the existence of a public right over this second way. The learned judge being of opinion that no issue was raised as to the second way, directed a verdict for the plaintiff: it was held, that the direction was right, for the precise locality being material to the defence, the defendant was bound to show it in his pleadings. (*Ellison v. Iles*, 3 Per. & D. 391). To a declaration in trespass *quare clausum fregit*, the defendant pleaded that he and the former occupiers of the house and land had for twenty years used and enjoyed as of right a certain way on foot and with horses, &c., from and out of a common highway towards, into, through, and over the plaintiff's close to the defendant's house and lands and back, at all times of the year at their free will and pleasure. The replication averred that the defendant, &c. used and enjoyed the right of way mentioned in the plea, but that they did so under the plaintiff's leave and license. At the trial it appeared that the defendant and the former occupiers of his house and land had an admitted right of way from thence over the *locus in quo* to the highway, and across the highway to a close called Ruddock's, and that for the last twenty years they had had a license from the plaintiff to use, whenever they pleased, a way from the defendant's house and lands over the *locus in quo* to the highway and back, when they had any intention of going to Ruddock's: it was

held, that the replication was not supported by this evidence and that the plaintiff was bound to show a license co-extensive with the right claimed in the plea, and admitted by the replication. (*Colchester v. Roberts*, 4 Mees. & W. 76). By an enclosure act, it was enacted, that all ways over a certain field called West Field, allotted to B., should be extinguished from the time of the making and completion of a new road, therein directed; with a proviso that nothing in the act should extend, or be construed to extend, to deprive A., his heirs assigns, or his or their agents, &c., of the right of ingress, egress, and regress, to and from a watercourse, for the purpose of rebuilding, repairing, opening, or shutting the sluices thereon, or to cleanse the same: it was held, that this reserved to A. his right of way unimpaired over West Field, for the purpose in the act mentioned: it was also held, that a tenant of A., who occupied meadow land irrigated by means of the sluices, was competent witness in an action for an obstruction of this right of way. (*Adams v. Mortlock*, 7 Scott, 189; 5 Bing. N.C. 286; 3 Jur. 105).

Action for
disturbance
of ways.

An action on the case lies for the disturbance of a right of way, created either by reservation, grant, or prescription, (*Comm. Dig.* Action on the case for Disturbance, (A. 2); 1 Roll. Abr. 109); and such disturbances may be either by absolutely stopping up the way, or by ploughing up the land through which the way passes, (2 Roll. Abr. 140), or by damaging the way with carriages, so that it is of no use. (*Laughton v. Ward*, 1 Lutw. 111). But such action will not lie for the disturbance of a highway, unless the plaintiff has sustained some special damage. (*Co. Litt.* 56, a; 5 Rep. 73, a; 2 Bing. 263, 266). A public thoroughfare was stopped, whereby the plaintiff, a bookseller, whose shop was in the thoroughfare, suffered a loss of custom, it was held sufficient special damage to entitle him to his action on the case. (*Wilks v. Hungerford Market Company*, 2 Scott, 446; 2 Bing. N.C. 281; 1 Hodges, 281). In a late case it was held that a reversioner cannot maintain an action on the case against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way, such an act during the tenancy not being necessarily injurious to the reversioner; for in order to entitle a reversioner to maintain an action on the case against a stranger, he must allege in his count, and prove at the trial, an actual injury to his reversionary interest. (*Baxter v. Taylor*, 4 B. & Ad. 72; 8 C. 1 Nev. & M. 11. See *Jackson v. Pesked*, 1 Maule & S. 234; *Alston v. Scates*, 2 Moore & Scott, 5). A reversioner cannot sue for the obstruction of a right of way, unless the obstruction be such as either permanently injures the estate, or operates in denial of the right. (*Hopwood v. Scholfield*, 2 M. & Rob. 34. See *Young v. Spencer*, 10 B. & Cr. 145). In a declaration for a disturbance of a private way, it is necessary to state the *terminus à quo* and *ad quem*; and if it lead to a private close,

to state some interest of the plaintiff therein. And it should also be shown whether the way be a *cart-way*, *horse-way*, or *foot-way*. (Com. Dig. Action on the Case for Disturbance (B. 1); *Allen v. Ormond*, 8 East, 4; *Parke v. Stewson*, Noy, 36; S. C. Latch. 160. See 5 Carr. & Payne, 579). But if both the *termini* of a private way claimed by prescription be correctly stated, it is not necessary to take notice of all the intervening land. (*Simpson v. Leathwaite*, 3 B. & Ad. 229; and see 1 H. Bl. 351; 1 East, 381, n.) By one of the rules made in Hilary Term, 1834, in pursuance of the stat. 3 & 4 Will. 4, c. 42, pleas of a right of way over the *locus in quo*, varying the *termini*, or the *purposes*, are not to be allowed. See *ante*, p. 22; and see further as to pleadings in cases of ways, *ante*, pp. 22—24.

Where the lessees of a colliery had agreed to grant to the lessees of a neighbouring colliery license to use a right of way enjoyed by the former, and the owner of the first colliery had granted to the second lessees the same right of way during a term of years, and afterwards by assignment from the first lessees became possessed of the first colliery and the right of way, an injunction was granted to restrain him from removing the materials and destroying the way. (*Newmarch v. Brandling*, 3 Swanst. 99).

5. OF WATERCOURSES.

The right of conducting water through one estate for the use and convenience of an adjoining estate, is an incorporeal hereditament of the class of easements, or a prædial service, which was known to the civilians under the name of *servitus aquæ ductus*, (Domat's Civil Law, L. 1, T. 12), and is of use when Scius has a scarcity of water, and requires it for watering his cattle, or his lands, or for making his mill go, or for any other such advantage to his ground. (2 Frederican Code, 144). The principles upon which the right to the use of water depends, were thus expressed by Sir J. Leach, V. C., in a luminous judgment:—" *Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors, who may be affected by his operations. No proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years; which term of twenty years is now adopted, upon a principle of general convenience,

Nature of
the right to
water.

as affording conclusive presumption of a grant." (*Howard v. Wright*, 1 Sim. & Stu. 203; the foregoing remarks were adopted by Lord Tenterden, C. J.; *Mason v. Hill*, 3 B. & Ad. 312, 313; and see 5 B. & Ad. 18.)

In *Prescott v. Phillips*, cited 6 East, 213; 5 B. & Ad. 23; 2 Nev. & Man. 747, it was ruled "that nothing short of twenty years' undisturbed possession of water diverted from the natural channel or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious; and that a possession of above nineteen years, which was shown in that case, was not sufficient. (See *Cor v. Matthews*, 1 Ventr. 237, cited 1 B. & Ad. 25.) For the important alterations which have been made on this subject by stat. 2 & 3 Will. 4, c. 71 ss. 2, 4, 5, 6, 8, see *ante*, pp. 5—27. It seems to be a correct proposition of law, that the possessor of land through which a natural stream runs, has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below; that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise descend, nor can any proprietor below throw back the water without his license or grant; and that whether the loss by diversion of the general benefit of such a stream be or be not such an injury in point of law as to sustain an action without some special damage, yet as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting.

The converse proposition, that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream and apply it to a useful purpose has a good title to it against all the world, including the proprietor of the lands below, who has no right of action against him unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interferes, and in default of his having done so, may altogether deprive him of the benefit of the water, is said to have originated in a mistaken view of the principles laid down in *Bealy v. Shaw*, 6 East, 208; *Saunders v. Newman*, 1 B. & Ald. 258; *Williams v. Morland*, 2 B. & C. 913. In *Williams v. Morland*, (2 B. & C. 910), *Bayley, J.*, said, "flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it: subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public." In *Liggins v. Inge* (7 Bing. 692), *Tindal, C. J.*, said, "Water flowing in a stream, it is well settled by the law of England, is *publici juris*. By the Roman law, running water, light, and air, were considered

as some of those things which were *res communes*, and which were defined, things the property of which belongs to no person, but the use to all. And by the law of England, the person who first appropriates any part of this water flowing through his land to his own use, has the right to the use of so much as he then appropriates against any other." (See 2 Blac. Comm. 14; *Beasley v. Shaw*, 6 East, 208). *Denman*, C. J., however, said, "that none of these *dicta*, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities, that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose, has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water." (*Mason v. Hill*, 5 B. & Ad. 23.) His lordship, after citing from the Roman law, 2 Inst. Tit. 1, s. 1; Dig. book 43, tit. 13, tit. 12, s. 4, proceeded thus, "From these authorities it seems that the Roman law considered running water, not as a *bonum commune*, in which any one might acquire a property, but as public or common, in this sense only, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only. We think that no other interpretation ought to be put upon the passage in Blackstone, (2 Bl. Comm. 14), and that the *dicta* of the learned judges above referred to (*ante*, p. 72), in which water is said to be *publici juris*, are not to be understood in any other than this sense; and it appears to us that there is no authority in our law, nor, as far as we know, in the Roman law (which, however, is no authority in ours), that the first occupant, though he may be the proprietor of the land above, has any right by diverting the stream to deprive the owner of the land below of the special benefit and advantage of the natural flow of water therein. (*Mason v. Hill*, 5 B. & Ad. 24.) See *Arkwright v. Gill* (5 Mees. & W. 220), where *Parke*, B., said, "the object of the judgment in *Mason v. Hill* was to set right the mistaken notion which had got abroad in consequence of certain *dicta* in *Williams v. Morland* (2 B. & C. 910), that flowing water is *publici juris*, and that the first occupant of it for a beneficial purpose may appropriate it."

The position that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrong-doer: and the owner of the land who applies the stream that runs through it to the use of a mill newly erected, or other purposes, if the

stream is diverted or obstructed, may recover for the consequential injury to the mill. (*The Earl of Rutland v. Bowler, Palmer*, 290.) But it is a very different question whether he can take away from the owner of the land below one of its natural advantages which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied, and deprive him of it altogether by anticipating him in its application to a useful purpose. If this be so, a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall within its limits, might at any time be taken away; and by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another. (*Mason v. Hill*, 5 B. & Ad. 18.)

Ownership of
soil of rivers.

Where a river is not navigable, the presumption is, that the soil is the property of the owners on each side to the middle of the river, and consequently they are entitled to a co-extensive right of fishing. And if a man is owner of the land on both sides, by common presumption he is owner of the whole river. (*Carter v. Murest*, 4 Burr. 2163; *Harg. L. Tracts*, 5; *Ritz v. Wharton*, 12 Mod. 510.) Where in trespass *quare clausum fregit* the plaintiff claimed the whole bed of the river flowing between his land and the defendant's, the defendant contending that each was entitled *ad medium filum aque*; it was held that evidence of acts of ownership exercised by the plaintiff upon the banks of the river on the defendant's side lower down the stream, and where it flowed between the plaintiff's land and a farm of C. adjoining the defendant's land, and also of repairs done by the plaintiff to a fence which divided C.'s farm from the river, and was in continuation of a fence dividing the defendant's land from the river, was admissible for the plaintiff. (*Jones v. Williams*, 2 Mees. & W. 326.) But in the case of a navigable river, the presumption is, that the soil is vested in the crown, yet a subject may claim a prescriptive right to a several fishery in an arm of the sea even against the crown. (*Mayor of Oxford, &c. v. Richardson*, 4 T. R. 439. See *Rezv. Smith*, 2 Doug. 411.) But by grant or prescription a subject may have the interest in the water and soil of navigable rivers, as the city of London has the soil and property of the *Thames* by grant. (Dav. 56, b.; Com. Dig. Navigation (B.)) With respect to rivers that are not navigable, the proprietors of the banks on each side have an interest in the fishery of common right. So that every inland river that is not navigable, appertains to the owners of the soil. Where such rivers run between two manors, and are the boundaries between them, one moiety of the river and fishery belongs to one lord, the other to the other lord. (Davies, R. 155.) A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the crown before the commencement of the reign of Edward the First. Such a grant may be inferred from evidence of its having existed before that time. If the weir when

so far granted obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. Trespass for breaking down a weir appurtenant to a fishery. Justification, that the weir was wrongfully erected across part of a public and navigable river, the Severn, where the king's subjects had a right to navigate, and that the rest of the river was choked up, so that the defendants could not navigate without breaking down the weir. Replication, that the part where the weir stood was distinct from the channel where the right of navigation existed, and was not a public navigable river. Rejoinder, that the part was a part of the Severn, and that the king's subjects had a right to navigate there when the rest was choked up; and that the rest was choked up. Surrejoinder, traversing the right. It was held, that in support of this traverse the plaintiff might show use to raise presumption of such a grant as above, and was not bound for the purpose of introducing such proof to set out his right more specifically on the record. Where the crown had no right to obstruct the whole passage of a navigable river it had no right to erect a weir obstructing a part, except subject to the rights of the public; and therefore in such a case the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere. (*Williams v. Wilcox*, 8 Ad. & Ell. 314; 3 Nev. & P. 606.) Where a grant of wreck was made by Hen. 2, and confirmed by Hen. 8, to the proprietor of land on the coast, who within forty years had constructed an embankment across a small bog to reclaim sea mud, and had since asserted an exclusive right to the soil, without opposition, it was held, that from such usage anterior usage might be presumed; and that the usage, coupled with the terms of the grant, served to elucidate it, and to establish the right so asserted. (*Chad v. Tilsed*, 2 Brod. & Bing. 403.) By act of parliament, reciting that a certain tract of land, daily overflowed by the sea, and to which the king in right of his crown claimed title, might be rendered productive if embanked, and that his majesty had consented to such embankment, a part of the said land, called Lipson Bay, was granted to a company for that purpose. On one side of the bay was the northern side of an estate called Lipson Ground, forming an irregular declivity, in parts perpendicular, and in parts sloping down to the seashore, and overgrown with brushwood and old trees. The company, in embanking the bay, made a drain on this side, in the same direction with the cliff, cutting through it in parts, but leaving several recesses of small extent between the projecting points. These recesses used to be overspread with seaweed and beach, and were covered by the high water of the ordinary spring tides, but not by the medium tides. It was held, in the absence of proof as to acts of ownership, that the soil of these recesses must be presumed to have belonged to the owner of the adjoining estate, and not to the crown, and

Navigable
rivers.

did not therefore pass to the embankment company by the act of parliament. (*Lowe and another v. Govett*, 3 B. & Ad. 863.) The use of the banks of a river for more than twenty years by fishermen who have occasionally sloped and levelled them, is evidence of a grant by the owner of the soil, although both the fishery and landing-place once belonged to the same person, and there was no evidence to show that the former owner, or those who claimed under him, knew that the shore had been so used. (*Gray v. Bond*, 2 Brod. & Bing. 667.)

Whether a river be navigable or not is a question of fact for the jury. (*Vooght v. Winch*, 2 B. & Ald. 662.) The flux or reflux of the tide is evidence of a navigable river, (*Miles v. Rose*, 5 Taunt. 705), but not absolutely inconsistent with an exclusive right. A judgment in an action on the case, disaffirming an exclusive right to a river, is strong evidence in another action trying the same right, but not conclusive. On a question whether a creek be a public navigable river or not, instances of persons going up it for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it a public river. (*Miles v. Rose*, 1 Marsh. 313; 5 Taunt. 705; 4 Maule & S. 101.) It was held in that case that the cutting of rushes in the creek by strangers, without interruption, was a strong circumstance to show that the river was public, and the fact that pleasure-boats were accustomed to sail up the creek was also relied on. But a right to a track path on each side of the river *Tees* (alternately) for towing without paying any acknowledgment, was found upon a trial at bar. (*Pierce v. Lord Fauconberge*, 1 Burr. 292). If an act of parliament for inclosing and allotting the commons and waste lands of a parish through which a navigable river flows, empower commissioners to set out such public and private roads and ways as they shall think necessary, and direct that all roads and ways not so set out shall be deemed part of the lands to be allotted; an ancient towing path upon the banks of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction. (*Simpson v. Scales*, 2 Bos. & P. 496.) A statute authorizing the making of a new course for a navigable river, and turning the whole part into a floating harbour, will not without words for the purpose put an end to a public towing path upon that part; but such towing path will be liable to be used as such for the purposes of the harbour, and it will make no difference though the river was a tide river, and not navigable at low water. (*Rex v. Tippet*, 1 Russ. C. & M. 317.)

The public at large have no common law right to bathe in the sea, and as incident thereto, of crossing the shore on foot or with bathing machines for that purpose. (*Blundell v. Catterall*, 5 B. & Ald. 268.) So there is not at common law a general right in the public of entering the sea shore for the purpose of taking sea weed. (*Howe v. Stowell*, 1 Alcock & Napier, 348.) The public are not entitled at common law to tow on

the banks of ancient navigable rivers: the right must be founded on statute or on usage, (*Ball v. Herbert*, 3 T. R. 256; see 1 Lord Raym. 725; Bull. N. P. 90; 6 Mod. 163, *contra*.)

The privilege of a watercourse is not confined to private individuals; it may be vested in a corporation, as where there was a grant to the corporation of Carlisle of water, for the purpose of turning the city mills. (8 East, 487.) So also inhabitants may prescribe for such an easement, as where the inhabitants of a vill, or the parishioners of a parish, alleged a custom or usage of keeping an ancient ferry-boat. (3 Mod. 294.) A right of ferry is a matter in which the public are interested, and of which therefore reputation is evidence, and so also is a verdict or judgment of a court of competent jurisdiction, touching the same right, although between other parties. (*Pim v. Currell*, 6 Mees. & W. 234.)

It requires a deed to create a right and title to have a passage for water. (4 East, 107; 5 B. & Cr. 232; *ante*, p. 49.) Although the right to a flow of water formerly belonging to the owner of a mill can only pass by grant, as an incorporeal hereditament, yet after a parol license to perform works upon a river had been executed, it is sufficient to relieve the party from restoring it to its former state, although the license has been countermanded. Thus, where plaintiff's father, by oral license, had permitted the defendants to lower the bank of a river, and make a weir above the plaintiff's mill, whereby less water than before flowed to the plaintiff's mill, it was held that the plaintiff could not maintain an action against the defendants for continuing the weir, as it was a license to construct a work in its nature permanent and continuing, and attended with expense to the party using the license, who might sustain a heavy loss by its being countermanded; and it was the fault of the party himself, if he meant to reserve the power of revoking such a license after it was carried into effect, that he did not expressly reserve that right when he granted the license, or limit it as to duration. (*Liggins v. Inge*, 7 Bing. 682; see *Mason v. Hill*, 5 B. & Ad. 15.) The only ground on which such a parol license can be held irrevocable, is, that it has been acted on and expense incurred. (5 B. & Ad. 15.)

The right to water, how obtained.

At common law, a proprietor of land adjoining a river has a right to raise the banks, from time to time as occasion may require, upon his own land, so as to confine the flood-water within the banks, and to prevent it from overflowing his land, with this single restriction, that he does not thereby occasion any injury to the lands or property of other persons. Therefore, where the occupiers of lands adjoining a canal who erected artificial banks called fenders, to prevent the flood-water escaping upon their land, in consequence of which the canal banks were enlarged and the navigation obstructed, were indicted and found guilty, the judgment was reversed, and a *venire de novo* awarded, because the jury had not found whether, before the making of the canal or embankment, the landowners had exer-

How to be used.

cised the right of raising the banks from time to time as occasion required, so as to confine the water at all times within the ordinary channel, and prevent it in times of flood from overflowing the banks, nor whether the passage over the banks in times of flood was the usual and ordinary course. (*Re v. Trafford*, 1 B. & Ad. 874; S. C. in error, 8 Bing. 204; 1 M. & Scott, 401; 2 Crompt. & Jerv. 265; 2 Tyrw. 201.) There was an appeal in the last case to the House of Lords, 20 June, 1834, when the parties were advised to come to an arrangement, and the hearing was postponed *sine die*.

The proprietor of lands along which there is a flood stream, cannot obstruct its old course by a new water way, to the prejudice of the proprietor of lands on the opposite side. Thus, a proprietor of land on the bank of a river, who had commenced the building of a mound, which, if completed, would, in times of ordinary flood, have thrown the waters of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them, was restrained by a perpetual interdict, in Scotland, from the further erection of any bulwark, or other work, which might have the effect of diverting the stream of the river, in time of flood, from its accustomed course, and throwing the same on the lands of the other proprietor; Lord Chancellor Lyndhurst observing, that it was clear, beyond the possibility of a doubt, that by the law of England such an operation could not be carried on. (*Menzies v. Breadalbane*, 3 Bligh, N. S. 414, 418.) The long enjoyment of a watercourse is the best evidence of right, and raises a presumption of an agreement; and proof of a special license, or that it was limited in point of time, must come from the party who opposes the right. (*Finch v. Resbridge*, 2 Vern. 350; Gilb. Eq. C. 3.) Independently of any particular enjoyment which another has been accustomed to have, every person is entitled to the benefit of a flow of water in his own lands without diminution or alteration; but an adverse right may exist, founded on the occupation of another, and although the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it hath existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right. Before the stat. 2 & 3 Will. 4, c. 71, twenty years' exclusive enjoyment of water in any particular manner, afforded a strong presumption of right in the party so enjoying it, derived from grant or act of parliament. (*Bealy v. Shaw*, 6 East, 208; *Cor v. Matthews*, 1 Vent. 237; 2 Wms. Saund. 113 b. See *Dowd v. Wrigley*, 1 C. P. Coop. 329.) The owner of land through which a natural stream of water runs (which has been diminished in quantity by having been in part appropriated to the use of works above, for upwards of twenty years, without objection) may, after erecting a mill on his own land, maintain an action against the proprietor of these works, for an injury to such

mill by a further subsequent diversion of the water. (*Bouley v. Shaw*, 6 East, 208; see 5 B. & Ad. 19.)

It is not necessary that the mode of enjoying a watercourse should always have been precisely the same, for where in an action for a nuisance to a watercourse, the plaintiff declared on his possession, and stating the mill to be an ancient one, it was held to be no defence, that he had within twenty years somewhat altered the wheels. (*Saunders v. Newman*, 1 B. & Ald. 259.) In which case it was said by Abbott, J., "that the owner is not bound to use the water in the same precise manner, or to apply at the same mill, if he were it would stop all improvement in machinery. If indeed the alterations made from time to time prejudiced the right of the lower mill, the case would be different; but here the alteration is by no means injurious, the old wheel drew more water than the new one." (*Ib.*; see *Luttrell's case*, 4 Rep. 87 a.)

If an ancient ditch has at one end anciently opened into a stream, and the owner of a mill on the stream has kept the opening at the end of the ditch closed for twenty years and more, without interruption, that would give the mill owner such a right to keep it shut up, that the owner of the land adjoining the ditch would not be justified in reopening the communication, although it might appear that the communication between the ditch and stream was ancient. (*Drosett v. Sheard*, 7 Car. & P. 465, Littledale). If the owner of a water mill worked by a ground-shot wheel at a low head of water alter the wheel to a breast-shot wheel, which requires a high head of water, and after that, for twenty years and more discontinue the use of the breast-shot wheel, and resume the use of the ground-shot wheel, his discontinuance will cause the mill owner to lose his right to the high head of water. (*Ib.*) A right to a watercourse is not destroyed by the owners altering the course of the stream, and the owner may establish his claim notwithstanding an interruption within twenty years of his action brought to enforce the right. Where the plaintiff had a right to water flowing from the defendant's land across a lane to his own land, and it appeared that "formerly the stream meandered a little down the lane before it flowed into the plaintiff's land, and that in the year 135 the plaintiff, in order to render its enjoyment more commodious to himself, a little varied the course, by making a straight cut direct from the opening or spout under the defendant's hedge across the lane to his own premises:" and this it was contended negatived the right claimed in the declaration. *Tindal, C. J.* said, "If such an objection as this were allowed to prevail, any right, however ancient, might be lost by the most minute alteration in the mode of enjoyment, the making straight a crooked bank or footpath would have this result. No authority has been cited, nor am I aware of any principle of law or common sense upon which such an argument could base itself. (*Hall v. Swift*, 6 Scott, 167; 4 Bing. N. R. 381.)

Alteration in
mode of en-
joyment.

If one has anciently pits which ~~are~~ supplied by a rivulet, he may cleanse them, but cannot change or enlarge them, (*Brown v. Best*, 1 Wils. 174,) nor change the channels from a river to the prejudice of another owner. (*Duncomb v. Randall*, Hetl. 32.)

Previously to the stat. 2 & 3 Will. 4, c. 71, (*ante*, p. 5—27.) the acquiescence of lessees would not bind the landlord, nor that of tenants the reversioner. Thus where A., who was tenant for life with a power of jointuring, which he afterwards executed, and in 1747 gave a license to B. to erect a weir on a river in A.'s soil, for the purpose of watering B.'s meadow, then A. died and the jointress entered, and continued seised till 1799, when the tenant of A.'s farm diverted the water from the weir, upon which the tenant of B.'s farm brought an action on the case for diverting the water; the court were of opinion that the uninterrupted possession of the water for so many years, with the acquiescence of the particular tenants for life, would not affect the reversioner, although they refused to disturb a verdict which had passed for the plaintiff, inasmuch as it would not conclude the rights of the parties. (*Bradbury v. Grinsell*, 2 Wms. Saund. 175, n. (d.)) Evidence of user for twenty years of a head stock to pen up a rivulet was held insufficient evidence for raising the presumption of a grant to warrant its continuance to the injury of church land; for if the preceding vicar had made such a grant, it would not have bound his successor. (*Bright v. Walker*, 3 Smith's R. 316. See *Barker v. Richardson*, 11 East, 372. See *ante*, pp. 25—27.) Although an adverse enjoyment for the space of twenty years is, as against a private individual, evidence of a grant by him, yet it is otherwise in the case of a public river navigable by all the king's subjects; for no obstruction for twenty years will bar a public right. (*Vooght v. Winch*, 2 B. & Ald. 662; *Weld v. Hornby*, 7 East, 195.) A public right of navigation may be extinguished either by an act of parliament, a writ *ad quod damnum* and inquisition, or, under certain circumstances, by commissioners of sewers, or by natural causes, such as the recess of the sea, or accumulation of silt or mud. And where a public road, obstructing a channel once navigable, has existed for so long a time that the state of the channel when the road was made cannot be proved, it is to be presumed that the right of navigation was legally extinguished. (*Rex v. Montague*, 4 B. & C. 598.) A corporation being the conservators of a river and the owners of the soil between high and low water-mark, cannot authorize their lessee to erect a wharf there which produces inconvenience to the public in the use of the river for the purposes of navigation. (*Rex v. Lord Grosvenor and others*, 2 Stark. N. P. C. 511.)

**Artificial
watercourses.**

In the absence of a special custom, artificial watercourses are not distinguished in law from natural ones; and a title may be gained by twenty years' user as well to the former as the latter. Therefore, where mine owners made an adit through their lands to drain the mine, which they after-

wards ceased to work, and the owner of a brewery, through whose premises the water flowed for twenty years after the working had ceased, had, during that time, used it for brewing: it was held, that he thereby gained a right to the undisturbed enjoyment of the water, and that mines could not afterwards be so worked as to pollute it. It is questionable whether a universal practice in the neighbourhood to resume the use of such adit waters, for mining purposes, after a long interval, might not have been set up in answer to the claim of easement, thereby raising the inference that the party claiming used the water, not of right, but only during the accidental disuse of the adit and with knowledge that the mine owners reserved to themselves a power to recommence working, and thereby disturbing the waters. (*Magor v. Chadwick*, 11 Ad. & Ell. 571; 3 P. & Dav. 367. See *Arkwright v. Gell*, 5 Mees. & W. 232.) The court, in refusing a new trial, said that the proposition that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water, if proved to have been originally artificial, seems to be quite indefensible. And the late case of *Arkwright v. Gell*, 5 Mees. & W. 203 (see post) leads to no such conclusion. (Per Lord Denman, *Magor v. Chadwick*, 11 Ad. & Ell. 586.)

The stannars of *Devonshire* are not entitled, by custom, to divert water from streams into their mines, and for that purpose to dig trenches over other people's lands. (*Bastard v. Smith*, 2 M. & Rob. 129).

A party receiving water drained from a mine has no right to compel the owners of the mine to continue such discharge. Before the year 1705, a company of adventurers had begun to construct a sough or level, now called the *Cromford Sough*, for the purpose of draining a portion of the mineral field in the *Wapentake of Wirksworth*, in *Derbyshire*; being remunerated, by agreement with the proprietors of the mines, by a portion of the lead ore raised within the district benefited thereby (technically called the "Title of the Sough.") The water from this sough flowed into a brook called *Bonsall Brook*, and their united waters turned an ancient corn-mill. In 1738, they leased this easement of continuing and maintaining the sough to certain parties for 999 years. In 1771, A. obtained a lease for eighty-four years, from the owner of the land through which the sough was made, of the brook, of the stream of water issuing from the sough into it, and of the piece of land on which the corn-mill stood, with the right of erecting mills thereon; and accordingly, in 1772, erected extensive cotton-mills thereon, partly on the site of the ancient corn-mill, and they were worked by the same junction of the two streams. This lease contained a proviso, that if, during the term, the stream issuing from *Cromford Sough* should by the bringing up of any other sough, or by unavoidable accident, be taken away or lessened, so that there should not come to the mills sufficient water for working

them, and the lessor should not be able otherwise to supply it, it should be lawful for A. to take down the mills, and remove them to another piece of ground therein described, of which a lease should be granted for the rest of the term. In 1789, A. purchased from the lessor the absolute interest in the land leased, and in that through which so much of the sough was made as lay within the manor of Cromford. In the mean time, another company had, in 1771, commenced the construction of another sough on a lower level, called the *Meer Brook Sough*, (commencing within the manor of *Wirksworth*), for the purpose of draining a larger portion of the mineral field, under a similar license from the same mine-owners who had before used the *Cromford Sough*. In 1836, *Meer Brook Sough* having been so far extended into *Cromford* as to drain *Cromford Sough*, the water supplying A.'s mills was thereby diverted: it was held, that, under the circumstances, A. had not acquired by user of the water issuing from *Cromford Sough* such a right to it as to entitle him to maintain an action against the proprietors of the *Meer Brook Sough*, this being an artificial watercourse made for a particular and temporary purpose, and its water having been originally taken by him with notice that it might be discontinued, and the circumstances not being such as to afford any presumption of a grant by the owners of the mines; and that he did not acquire such right by force of the stat. 2 & 3 Will. 4, c. 71, s. 2. (*Arkwright v. Gell*, 5 Mees. & W. 203.) The right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a watercourse, at common law, independently of the effect of user under the stat. 2 & 3 Will. 4, c. 71, was to use it for any purpose to which it was applicable so long as it continued there. An user for twenty years, or a longer time, would afford no presumption of the right to the water in perpetuity; for such a grant would in truth be neither more nor less than an obligation on the mine owner not to work his mines by the ordinary mode of getting minerals below the bed drained by that sough, and to keep the mines flooded up to that level, in order to make the flow of water constant for the benefit of those who had used it for some profitable purpose. The court were of opinion, that the statute did not give A., and those who claimed under him, any such right. Lord Abinger, C. B. said, "the whole purview of the stat. 2 & 3 Will. 4, c. 71, shows, that it applies only to such rights as would before the act have been acquired by the presumption of a grant from long user. The act expressly requires enjoyment for different periods, 'without interruption,' and therefore necessarily imports such an user as could be interrupted by some one 'capable of resisting the claim,' and it also requires it to be of right. But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the *Cromford Sough*, and was incapable of interruption by them at any time during the whole period, by any reasonable mode; and as against them it was not 'of right,'

they had no interest to prevent it; and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it. We therefore think that the plaintiffs never acquired any right to have the stream of water continued in its former channel, either by the presumption of a grant or by the recent statute, as against the owners of the lower level of the mineral field, or the defendants acting by their authority, and therefore our judgment must be for the defendants. (*Arkwright v. Gell*, 5 Mees. & W. 203. See observations on this case in *Magor v. Chadwick*, 11 Ad. & Ell. 571, *ante*, p. 81.)

By the term watercourse, is usually understood a stream subterranean of water flowing above ground; but questions of a similar nature occur respecting the right to water flowing in a subterranean channel. It was held by Lord Ellenborough, C.J., that after twenty years' uninterrupted enjoyment of a spring of water, an absolute right to it is gained by the occupier of the close in which it issues above ground, and the owner of an adjoining close cannot lawfully cut a drain whereby the supply of water to the spring is diminished. (*Balston v. Bensted*, 1 Camp. 463.) But in *Cooper v. Barber*, 3 Taunt. 99, where the defendant had for many years past passed back a stream for the purposes of irrigation, the consequence of which was, that the water penetrated through the neighbouring soil, the court appear to be of opinion, that no right to cause such percolation was acquired by the user, and that the adjoining owner, on receiving injury from it upon erecting a house, might bring an action for it. Although every one in building is bound so to construct his house as not to overhang his neighbour's property, and to construct his roof in such a manner as not to throw the rain water upon the neighbouring land, (11 Hen. 7, f. 257,) yet a right by user for twenty years and upwards for the owner to project his wall or eaves over the boundary line of his property, or to discharge the rain running from the roof of his house upon the adjoining land, has been recognized. (*Thomas v. Thomas*, 2 Cr. M. & R. 34. See *Wright v. Williams* 1 Mees. & W. 77; *Lady Browne's case*, cited in *Slaney v. Piggott*, Palm. 446; Com. Dig. Action on Case for Nuisance, A.; *Baten's case*, 9 Rep. 50, n. (b); Vin. Abr. Nuisance, (G. 5.)) The occupier of a house who has a right to have the rain fall from the eaves of it upon another man's land, cannot put up spouts to collect that rain and discharge it upon such land in a body. (*Reynolds v. Clarke*, 1d. Raym. 1299.) If one has a right to enter into the yard of another, and he fixes a spout there to discharge water upon the plaintiff's land, trespass will not lie but case. (*Reynolds v. Clarke*, 1 Str. 634; 8 Mod. 272; Fort. 212.)

Building a roof with eaves, which discharge rain-water by a spout into adjoining premises, is an injury for which the landlord of such premises may recover as reversioner, while they are under demise, if the jury think there is a damage to the

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reversion. (*Tucker v. Newman*, 11 Ad. & Ell. 40.) It was said by Lord Abinger, C. B., "that if water from the spout of the eaves of a row of houses has flowed into an adjoining yard, and been there used for twenty years by its occupiers, that the owners of the houses had not contracted an obligation not to alter their construction so as to impair the flow of water." (*Arkwright v. Gell*, 5 Mees. & W. 233.)

Where the owners of property have by long enjoyment acquired special rights to the use of water in its natural state, as it was accustomed to flow, by way of particular easement to their own properties, and not merely a use, which is common to all the king's subjects, an action on the case may be maintained for a disturbance of the enjoyment, (4 East, 107;) but where the injury, if any, is to all the king's subjects, the only remedy is by indictment. (*Rex v. Bristol Dock Company*, 12 East, 429.) An act of parliament passed for the purpose of making navigable a natural river does not vest in the undertakers of the navigation the bed of the river, but gives them for that purpose a mere privilege of scouring and cleansing it, which is a mere easement. (*Rex v. The Mersey, &c. Navigation*, 9 B. & C. 114; *Rex v. Thomas*, id. 95.) The proprietors of a navigation have no property either in the soil over which the water flows or in the adjoining banks under an act of parliament allowing them the use of the land through which the river passes. (*Hollis v. Goldfinch*, 1 B. & C. 221.) It has been said, that the mere obstruction of the water, which has been accustomed to flow through the plaintiff's lands, does not *per se* afford any ground of action: some benefit must be shown to have arisen from the water going to his lands; or at least it is necessary to show that some deterioration was occasioned to the premises by the subtraction of the water. (*Williams v. Morland*, 2 B. & Cr. 915; S. C. 4 Dowl. & Ry. 583.) It is not clear that an occupier of land may not recover for the loss of the general benefit of water flowing through his land, without a special use or damages shown. (*Palmer v. Keblethwaite*, 1 Show. 64; S. C. Skinn. 65; *Glynne v. Nicholas*, 2 Show. 507; S. C. Comb. 43; *Mason v. Hill*, 5 B. & Ad. 26, 27, ante, pp. 72, 73.)

The proprietor of lands contiguous to a stream, may, as soon as he is injured by the diversion of the water from its natural course, maintain an action against the party so diverting it; and it is no answer to the action that the defendant first appropriated the water to his own use, unless he has had twenty years' undisturbed enjoyment of it in the altered course. Where A. erected a mill in 1823 on his own land, the former owner of which had for twenty years before 1818 appropriated the water of a stream running through it, to the purposes of watering his cattle and irrigating his land. In 1818, B. had erected a mill near the same stream, and the owner and occupier of A.'s land then gave a parol license to B. to make a dam at a particular spot, and take what water he

pleased from that point, which water was so taken, and returned by pipes into the stream above the spot where A.'s mill was afterwards erected. In 1818, B. without license conveyed part of the water which had before flowed into the stream from certain springs into a reservoir for the use of his mill. In 1828, A. appropriated to the use of his mill all the surplus water which flowed through and over the dam, and which was not conducted into the reservoir. In 1829, A. demolished the dam erected by B., and gave him notice not to divert the water. B. then erected a new dam lower down the stream, and by means of it diverted from A.'s mills, at some times, all the water before appropriated by A., at others a part of it, and the water, when returned into the stream, was in a heated state. It was held, on special verdict, 1st, That whether the right to the use of flowing water be in the first occupant, or in the possessor of the land through which it flows, A. was entitled to the surplus water, for he was first occupant of that and also owner and occupier of the land through which it flowed, and might maintain an action for the injury sustained by the abstraction or spoiling such water. 2dly. That A. was in like manner entitled to recover in respect of the water diverted by B. at his new dam, because the license granted to B. by the former occupier was to take the water at one particular point, and not at the place where this dam was made; and further, because if the license had been general to take at any place, it would have been revocable, except as to such places where it had been acted on and expense incurred, and it was worked before the last dam was erected. 3dly. That A. was entitled to recover for the water diverted from the springs and collected in a reservoir in 1818, for the possessor of land through which a natural stream flows has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for his own purposes; no adverse right having been acquired by actual grant, or by twenty year's enjoyment. (*Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1; 8. C. 2 Nev. & Mann. 747.)

If water has been accustomed to flow along a channel from time immemorial, and it has been appropriated, the first owner of the adjoining lands on both sides of it who appropriates it, without doing any injury to any one, either above or below him, acquires such a right by his appropriation, that though he may not have enjoyed it for twenty years, he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel. (*Frankum v. Earl of Falmouth*, 6 C. & P. 529.) If land, with a run of water upon it, be sold, the water passes with the land; and the vendee, having used the water, though for less than twenty years, gains a title to it by appropriation, and may maintain an action for obstructing it. (*Canham v. Fish*, 2 Cr. & Jerv. 126; 2 Tyrw. 155.)

An action on the case will lie for the special damage occa-

sioned to a party conveying goods along a navigation, by its obstruction by a barge moored across, whereby he was compelled to unload and carry his goods overland. (*Ross v. Miles*, 4 Man. & S. 101.) If the nuisance be of a permanent nature, and injurious to the reversion, an action may be brought by the reversioner, as well as by the tenant in possession, each of them being entitled to recover his respective loss. (*Biddlesford v. Onslow*, 3 Lev. 209; *Queen's College v. Hallett*, 14 East, 489; 1 Wms. Saund. 322 b, notes; *Jeffer v. Gifford*, 4 Burr. 2141; Com. Dig. Action on the Case for Nuisance, (B.)) It is no defence to an action by a reversioner, for an injury to the reversion, in not repairing a gutter for the conveyance of water through the plaintiff's land to the defendant's mill, whereby the water oozed through the gutter, and carried away the soil of the close, that the defect in the gutter was occasioned by the plaintiff's tenant. (*Lord Egremont v. Fulman*, 1 Moo. & Malk. 404. See post, p. 101.)

In case for an injury to the plaintiff's reversionary interest, by the defendant's obstruction of a watercourse on his land, and thereby sending water upon and under the house and land in the occupation of the plaintiff's tenant, the defendant pleaded, that the obstruction was caused by the neglect of the plaintiff's tenant to repair a wall on the demised land; that, in consequence, it fell into the watercourse, and caused the damage; and that within a reasonable time after the defendant had notice, he removed it: the plea was held to be bad, it not shewing any obligation on the tenant to repair the wall merely as terretenant; it is questionable whether the plea would have been good if it had. (*Bell v. Twentyman*, 1 Gale & D. 223.)

A right to take water from a well, by reason of the occupation of a dwelling-house, and for the more convenient occupation thereof, is an interest in land; therefore, where nominal damages had been recovered in an action for disturbing such a right, (on an issue traversing that the plaintiff was entitled to the use of the well in manner &c.), and the judge at Nisi Prius certified that the damages were under forty shillings, it was held that the plaintiff was entitled to his full costs, under stat. 43 Eliz. c. 6, s. 2. (*Tyler v. Bennett*, 5 Ad. & El. 377. See stat. 3 & 4 Vict. c. 24; *Skuttleworth v. Cocker*, 2 Scott N. R. 47; *Thompson v. Gibson*, 5 Jur. 390. See the forms of pleas for diverting watercourses since stat. 2 & 3 Wm. 4, c. 71, in 7 Carr. & P. 465—469, n; and as to rules of pleading, Hil. T. 4 Wm. 4, see ante, pp. 21—23.)

The commissioners of sewers have not such a possession in their works as to enable them to maintain an action of trespass against wrong-doers; therefore when they brought an action of trespass against the commissioners of a harbour for pulling down a dam erected by the former across a navigable stream, and had obtained a verdict, the court above ordered a nonsuit to be entered. (*Duke of Newcastle v. Clark and others*, 8 Taunt. 602). Commissioners of sewers may now acquire the legal

interest and constructive possession of land and works under 3 & 4 Wm. 4, c. 42, for amending the laws relating to sewers. See sections 24, 36, 47, 57.

A party entitled to a watercourse may legally enter the land of a person who has occasioned a nuisance to a watercourse, to abate it. (2 Smith's R. 9; Com. Dig. Pleader 3 M. 41.)

In an action for breaking the plaintiff's close, and destroying a hatch, the defendant pleaded that the water of the stream ought to have flowed to his mill, and because the hatch prevented its so doing, he pulled it down: evidence may be given as to what a former tenant said as to asking permission to have the water, as this is an act done, and may be proof of an exercise of a right by one side, and an acquiescence in it by the other. (*Wakeman v. West*, 8 Carr. & P. 105.)

On the filing of an information by the Attorney-General at the relation of an individual, and a bill by the relator, an injunction *ex parte* on affidavits was granted to restrain a purpresture in the river *Thames*; and it appearing that there had been no previous writ *ad quod damnum*, and that an indictment in the Court of King's Bench was depending against the defendants for the same act, the Lord Chancellor refused to dissolve the injunction before the trial of the indictment, notwithstanding there were some affidavits on the part of the defendants stating that the act complained of was beneficial to the navigation. And it was held to be immaterial to whom the soil belonged, it not being competent either to the crown or to a subject to use it for any purpose amounting to a nuisance. (*Attorney-General v. Johnson and others*, 2 Wils. C. C. 87; see *Kerrison v. Sparrow*, 19 Ves. 449; *Coop. C. C. 305*; *Crowder v. Tinkler*, 19 Ves. 617.) The rule with respect to interposing by injunction between public companies or trustees, in cases of apprehended mischief or nuisance, was thus laid down by Lord Brougham: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial; and will, according to the circumstances, direct an issue or allow an action, and if need be, expedite the proceedings, the injunction in the mean time being continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases, an issue may be directed for the satisfaction of the court, where an action could not be framed so as to meet the question." (*Earl of Ripon v. Hobart*, 3 M. & Keen, 179.)

Relief in equity as to watercourses.

An injunction was granted before answer to restrain the defendant from removing a bank which formed the plaintiff's only protection from inundations of the sea, on account of the irreparable injury the plaintiff was likely to sustain: it was intimated by the court, however, that the injunction would not

have been granted if the plaintiff had not previously established his right at law. (*Chalk v. Wyatt*, 3 Mer. 688). An injunction was granted against the obstruction of the flow of water through a goit in the defendant's land to the plaintiff's mill. (*Dewhurst v. Wrigley*, 1 C. P. Coop. 319.)

Where the court interposes by injunction to prevent a nuisance, provision ought to be made for having the question between the parties tried at law. (*Dewhurst v. Wrigley*, 1 C. P. Coop. 319; *Motley v. Downman*, 3 My. & Cr. 1, 14; *Att. Gen. v. Cleaver*, 18 Ves. 211, 218.) If a party having a right to the flow of water acquiesces for three or even two years, in the erection of works injurious to his right, equity will not interfere in his behalf until he has established his right at law. (*Weller v. Smeaton*, 1 Br. C. C. 572; 8 C. 1 Cox, 102; *Birmingham Canal Comp. v. Lloyd*, 18 Ves. 515; *Coop. C. C. 77*, 193. As to the effect of laches in depriving a party of his remedy by injunction, see *Blakemore v. Glamorganshire Canal Navigation*, 1 Mylne & Keen, 154. See post, pp. 101—103.)

A bill in equity will lie for the establishment of the enjoyment of a watercourse, and for the performance of a covenant to cleanse it. (*Holmes v. Buckley*, 1 Eq. Cas. Abr. 27, pl. 4; 2 Vern. 390; *Gilb. Eq. C. 3*; *New River Co. v. Graves*, 2 Vern. 431.) And it was held that a man who had been in possession of a watercourse sixty years might bring a bill against a mortgagee, who foreclosed the equity of redemption, to be quieted in the possession, although he had not established his right at law. (*Bush v. Western*, Prec. Ch. 530. See *Duke of Dorset v. Girdler*, Id. 531.) The diversion of watercourses, or the pulling down their banks, and causing inundation, are nuisances against which a court of equity will protect parties by injunction, and in some cases without first bringing an action at law. (*Martin v. Stiles*, Mos. 144; see 1 Ves. sen. 476; 2 Atk. 302; 3 Atk. 726; 1 Vern. 120, 129.) An injunction may be granted on the ground of danger to property. Where the defendant, having large pieces of water in his park supplied by the stream flowing to the plaintiff's mill, had at one time stopped the water and at another time let it out in such quantities as to endanger the mill, although the court will not restrain what has been enjoyed twenty years, yet it will interpose where a different mode of enjoyment calculated to do mischief is used; and an injunction was granted for restraining the defendant from using dams, &c. so as to prevent the water flowing in such regular quantities as it had done on a particular day. (*Robinson v. Lord Byron*, 1 Br. C. C. 588; see *Anon.* 1 Ves. jun. 140; *Crowder v. Tinkler*, 19 Ves. 620.) If on a motion to dissolve the injunction there be a question as to the right to the flow of water, an issue will be directed to try it. (2 Cox, 4.) The effect of an order specifically to repair the banks of a canal and other works has been obtained by an order to restrain a party using and enjoying a canal, from im-

pegs the navigation, by continuing to keep the canal, banks, or weirs out of repair; by diverting the water, or preventing it, by the use of locks, from remaining in the canals, or by continuing the removal of a stop-gate. (*Lane v. Newdigate*, 10 Ves. 192.) This case was said to go to the very uttermost verge of all the former cases. Lord Brougham agreed with Lord Lyndhurst in the opinion, that if the court had this jurisdiction, it would be better to exercise it directly and at once; and that the having recourse to a roundabout mode of obtaining the object seems to cast a doubt upon the jurisdiction. (*Blakemore v. The Glamorganshire Canal Navigation*, 1 M. & Keen, 183.) In this case the court, on an interlocutory application for an injunction, refused to grant the order in such a form as indirectly to compel some positive act to be done by the party enjoined. The leading principle to guide the court in such an application, at least where no very special circumstances occur, being that only such a restraint shall be imposed as may suffice to stop the mischief complained of, and where it is to stay further injury, to keep things as they are for the present. (*Id.* 185.)

The court refused to decree a specific performance of an agreement to purchase the fee-simple of certain lands, and also the right to impound the water of a river, and to divert from it a stream of water, because the vendor, though seised in fee of the lands, had only a lease for ninety-nine years of the other subjects of the contract, and had not, as against some of the proprietors of the land on the banks of the river, a right to divert the water; and because the purchaser had entered into a contract for the purpose of erecting a manufactory to be wrought by the water, and twelve years had elapsed between the time of the agreement and the hearing of the cause. (*Wright v. Howard*; *Howard v. Wright*, 1 Sim. & Stu. 190.)

6. OF THE RIGHT TO PEWS.

Of common right, the soil and freehold of the church is the Right to pews
parson's; the use of the body of the church, and the repair of founded on
common to the parishioners; and the disposing of the seats faculty or
therein the right of the ordinary. (Hob. 69; Gibs. Cod. tit. 9, prescription.
c. 4.)

The rector is entitled to the chief seat in the chancel unless it be prescribed for by another. (*Spry v. Flood*, 2 Curt. 356.)

An exclusive title to pews and seats in the body of the church may be maintained in virtue of a faculty, or by prescription, which is founded on the presumption that a faculty had been heretofore granted. All other pews and seats in the body of the church are the property of the parish; and the churchwardens, as the officers of the ordinary, and subject to his control, have authority to place the parishioners therein. No precise rules are prescribed for the government of churchwardens in the use of this power, for its due exercise must depend on a sound judgment and discretion applied to the circum-

stances of the parish. (*Report of Eccl. Commr. Feb. 1832*, p. 48.)

Disposal of
pews.

By the general law, and of common right, all the pews in a parish church are the common property of the parish; they are for the use in common of the parishioners, who are all entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats meets with the churchwardens, as the officers, subject to the control of the ordinary. (12 Rep. 105; 3 Inst. 202; 3 Hagg. Eccl. Rep. 733.) By the general law, the use of all the pews belongs to the parishioners; they are to be seated therein, in the first instance, by the churchwardens; the power of the latter, however, is subject to the control of the ordinary, who is to see that the churchwardens exercise their authority discreetly, for the proper accommodation of the parishioners *at large*. This is the law, not merely to be found in ecclesiastical authorities, but is the common law of the land, as laid down by the highest common law authorities. (*Blake v. Osborne*, 3 Hagg. Eccl. R. 733.) It will be sufficient to refer to Lord Coke. (12 Rep. 165; 3 Inst. 202.) The churchwardens have a discretionary power to appropriate the pews in the church amongst the parishioners, and may remove persons intruding on seats already appropriated. (*Reynolds v. Monkton*, 2 M. & Rob. 364.) The parishioners cannot prescribe to dispose of pews in exclusion of the ordinary. (1 Salk. 167, pl. 7.) Neither the minister nor the vestry have any right whatever to interfere with the churchwardens in seating and arranging the parishioners, as often erroneously supposed; at the same time the advice of the minister, and even sometimes the opinion and wishes of the vestry, may be fitly invoked by the churchwardens, and to a certain extent may be reasonably deferred to in this matter. The general duty of the churchwardens is to look to the general accommodation of the parish, consulting, as far as may be, that of all the inhabitants. The parishioners, indeed, have a claim to be seated according to their rank and station; but the churchwardens are not, in providing for this, to overlook the claims of *all* the parishioners to be seated, if sittings can be afforded them. Accordingly they are bound, in particular, not to accommodate the higher classes beyond their real wants, to the exclusion of their poorer neighbours, who are equally entitled to accommodation with the rest, though they are not entitled to equal accommodation, supposing the seats to be not all equally convenient. (2 Addams, R. 425, 426.)

The incumbent has no authority in the seating and arranging the parishioners beyond that of an individual member of the vestry, and which his station and influence in the parish naturally give him. He may properly object to a plan which is generally inconvenient, which diminishes the accommodation in the church, which disfigures the building, which renders it dark and inconvenient. In every case of this description, it is very proper he should make a representation to the ordinary; but as to the mere arrangement of seats, if the parishioners

seats that among themselves, and to their own satisfaction, and on agree about the expense, there seems but little necessity for the interference of the incumbent; the expense is that of the parishioners; the churchwardens are bound to repair with the consent of the vestry; it is not the vicar, but the vestry which appropriates the seats: the general superintendence and authority in allotting them rests with the ordinary. (1 Phill. R. 233.)

The general right then being in the parish and the ordinary, any particular rights in derogation of these are *stricti juris*; it is the policy of the law that few of these exclusive rights should exist, because it is the object of the law that all the inhabitants should be accommodated; and it is for the general convenience of the parish that the occupation of pews should be altered from time to time, according to circumstances. A possessory right is not good against the churchwardens and the ordinary: they may displace, and make new arrangements, but they ought not without cause to displace persons in possession; if they do, the ordinary would reinstate them: the possession therefore will have its weight,—the ordinary would put a person in possession, *ceteris paribus*, the preference over a mere stranger. (1 Phill. R. 324.)

A possessory right is sufficient to maintain a suit against a mere disturber. (*Spry v. Flood*, 2 Curt. 356.) The fact of possession implies either the actual or virtual authority of those having power to place. The disturber must show that he has been placed there by this authority, or must justify his disturbance by showing a paramount right,—a right paramount to the ordinary himself; namely, a faculty by which the ordinary has parted with the right; or if there be no proof of a faculty, there may be proof of prescription, and such immemorial usage as presumes the grant of a faculty. (1 Phill. R. 324.) Where the prescription is interrupted, the jury are not bound to presume a faculty from long undisturbed possession. (*Morgan v. Curtis*, 3 M. & R. 389.) On the expiration of a faculty, as where one was granted for ninety-nine years, the right of the parishioners to the use of the pew revives. (3 Hag. Eccl. R. 733.) A faculty (for annexing a pew to a messuage) obtained by surprise and undue contrivance may be revoked. (2 Hag. Eccl. R. 417.)

A prescriptive right must be clearly proved; the facts must not be left equivocal; and they must be such as are not inconsistent with the general right. In the first place, it is necessary to show that the use and occupation of the seat have been from time immemorial appurtenant to a certain messuage, not to lands; the ordinary himself cannot grant a seat appurtenant to lands. Secondly, it must be shown that if any acts have been done by the inhabitants of such messuage, they maintained and upheld the right. At all events, if any repairs have been required within memory, it must be proved that they have been made at the expense of the party setting up the prescriptive right. The *onus* and *beneficium* are sup-
Prescriptive right to pews, on what founded.

posed to go together ; mere occupancy does not prove the right. What might be the effect of very long occupancy, where no repairs have been necessary, does not appear to be decided. It is a common error to suppose that by mere occupancy pews become annexed to particular houses. In country parishes the same families occupy the same pews for a long time, but they still belong to the parish at large : if, however, it is shown that the inhabitants of a particular house *have repaired*, that fact establishes that the burthen and benefit have gone together, and is inconsistent with the right of the parish still to claim the benefit, and is evidence of the annexation of the pew. Thus the uniform and exclusive possession of the inhabitants of a particular messuage connected with the burthen of maintaining and repairing the seat is evidence sufficient to establish a prescriptive title. (1 Phill. R. 325-6.) To exclude the jurisdiction of the ordinary from the disposal of a pew, it is necessary, not merely that possession should be shown for many years, but that the pew should have been built and repaired time out of mind. (1 T. R. 428.) The strongest evidence of that kind is the building and repairing time out of mind ; but mere repairing for thirty or forty years will not exclude the ordinary. The possession must be ancient, and going beyond memory, though on this subject the high legal memory, even before the act 2 & 3 Will. 4, c. 71, was not required. (1 Hagg. Cons. R. 322.) Twenty years adverse possession seems to bar the right to a pew. (1 Phil. R. 328.)

Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title, and therefore if they sue in the ecclesiastical court to be quieted in the possession of such seats, the court of K. B. will grant a prohibition, although it seems that such persons cannot establish such a claim even by prescription. (*Byerly v. Windus and others*, 5 B. & C. 1 ; S. C. 7 Dowl. & Ry. 564.) See *Hallack v. University of Cambridge*, 1 Gale & D. 100.) A pew in an aisle or chancel may belong to a non-parishioner, for the case of an aisle or chancel depends upon, and is governed by, other considerations. (2 Addams, R. 427.)

A pew annexed by prescription to a certain messuage cannot, as is often erroneously conceived, be severed from the occupancy of the house, but passes with the messuage, the tenant of which for the time being has *de jure* the prescriptive right to the pew, (1 Hagg. Cons. R. 319 ; 1 T. R. 430 ; 3 M. & R. 334 ; 2 Add. 428.) which cannot be sold nor let without a special act of parliament. (1 Hagg. Eccl. R. 319, 321.) Where an occupier of a pew ceases to be an inhabitant of the parish, he cannot let the pew with, and thus annex it to his house, but it reverts to the disposal of the churchwardens. (Id. 34.) A person who has permission from the churchwardens to sit in a pew temporarily, and in order, by keeping possession for the future tenant, to carry into effect the conditions of sale of a house with which the pew has for above a century been held under an expired faculty, has no pos-

session on which he can bring a suit for perturbation of seat against a mere intruder, such permission by the churchwardens being illegal, as confirming the sale of the pew. (*Blakes v. Usborne*, 3 Hagg. Eccl. R. 726.) As to the power of vestrymen under the stat. 51 Geo. 3, c. 151, for St. Marylebone, see *Spry v. Flood*, 2 Curt. 356. Customs pleaded, "that pews are appurtenant to certain houses, and are let by the owners to persons who are not inhabitants of the parish," are bad. (1 Hagg. Cons. R. 317.) Custom, "that persons who had not pews appurtenant pay rent for seats, which is applied in payment of the parish rate," is a practice which has been constantly reprobated by the ecclesiastical courts, and discouraged as often as set up. (1 Hagg. Cons. R. 317.) But if a house to which a pew is appurtenant be let to a *parishioner*, in that character he is clearly entitled to the pew. (2 Add. 428.)

Where a pew is claimed as annexed to a house by faculty or prescription, the courts of common law exercise jurisdiction, on the ground of the pew being an easement to the house, and the proper remedy for a disturbance is an action on the case. (*Mainwaring v. Giles*, 5 B. & Ald. 361.) Where the pew is in a chancel, the freehold of an individual, the right to it is triable at common law. (*May v. Gilbert*, 2 Bulstr. 151.) The ecclesiastical court has jurisdiction in all suits respecting pews; but where prescriptive rights come in question, prohibition will be granted on the application of either party, for the purpose of having the prescription tried by a jury. (*Report of Eccl. Commrs.* p. 49.) If a man claiming title by prescription to an aisle, chancel, &c. as his freehold, or to a pew or seat in the body of the church, or in an aisle, &c. as appurtenant to a house in the parish, is disturbed therein by the person, ordinary, or churchwardens, by a suit in the spiritual court, he may have a prohibition, if he suggest as grounds for it, that he or those whose estate he hath, built, or time out of mind repaired, and therefore had the sole use of such aisle, or of such pew or seat; for the party has a right to a trial of the prescription in a temporal court. (See 1 Burn's Eccl. Law, 8 ed. 366, 7; *Witcher v. Chaslam*, 1 Wils. 17; *Cornen v. Pym*, 12 Rep. 105; *Jacob v. Dalton*, 2 Raym. 1755; *Boothby v. Bailey*, Hob. 69; *Francis v. Ley*, Cro. Jac. 266; *Dey v. Beddingfield*, Noy's Rep. 104; *Buxton or Buntan v. Bateman*, 1 Sid. 89; 8 C. 1 Lev. 71; Sir T. Raym. 52; *Crook v. Sampson*, 2 Keb. 92; *Brabin v. Tradum*, Poph. 140; 2 Roll. Abr. 287, 8.)

The uninterrupted possession of a pew in a church for twenty years affords a presumptive evidence of a legal title by prescription, or by a faculty against a wrong-doer. (*Darwin v. Upton*, 2 Wms. Saund. 175 c.) But if the right was claimed as appurtenant to an ancient messuage, the claim would, before the stat. 2 & 3 Will. 4, c. 71, be rebutted by proof that the pew began to exist within time of legal memory. (*Griffith v. Matthews*, 5 T. R. 296.) In an action on

Action for
disturbance
of pews.

the case for disturbing the plaintiff in the possession of a pew in a church, which the plaintiff and those under whom he claimed had been in the uninterrupted enjoyment of for thirty-six years, but which appeared in evidence to have been an open pew before that period; the judge recommended the jury to presume a title in the plaintiff after so long a possession as thirty-six years, and the Court of King's Bench afterwards, on a motion for a new trial held the direction of the judge proper. (*Rogers v. Brookes*, 1 T. R. 431, n.) But the pew must be laid in the declaration as appurtenant to a messuage in the parish, otherwise a bare possession of the pew for sixty years and more is not a sufficient title to maintain an action on the case for disturbing the plaintiff in his enjoyment thereof, but he must prove a prescriptive right or faculty. (*Stooks v. Beeth*, 1 T. R. 426.) So where a pew in a chancel, claimed in right of a messuage, was shown to have been erected on the site of old open seats in 1773, and there was no evidence of any faculty or search for one at the proper places; it was held that the judge rightly directed the jury, that the evidence of the former open state of the seats destroyed the prescription, and left it to them to say whether, upon the evidence merely of long undisturbed possession, any faculty existed; and a new trial was refused. (*Morgan v. Curtis*, 3 M. & Ry. 389.)

The grant of part of the chancel of a church by a *lay proprietor* to A., his heirs and assigns, is not valid in law, and therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down his or their pews there erected. (*Clifford v. Wicks*, 1 B. & Ald. 498.)

But the churchwardens have not, as against the incumbent of a church or chapel, a joint possession of it, so as to disable him from maintaining trespass against them for acts of violence in pulling down pews; and a chapelwarden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews without the consent of the perpetual curate. (*Jones v. Ellis*, 2 Y. & J. 266.) The perpetual curate of an augmented parochial chapelry has a sufficient possession whereon to maintain trespass for breaking and entering the chapel and destroying the pews. (*Id.*)

As well priority in a seat as a seat itself in the body of a church may be claimed by prescription, as belonging to a house by the inhabitants of it, who have repaired the seat time out of mind, and an action on the case for a disturbance lies at common law. (*Carleton v. Hutton*, Ney, 78; Gibs. 221.) And a pew in the body of the church may be prescribed for as appurtenant to a house out of the parish. (*Davis v. Wills*, Forr. R. 14; *Lousley v. Hayward and another*, 1 Youngs & Jerv. 583.)

Where the action is brought against a stranger, the plaintiff is not bound to state in his declaration that he has repaired the pew, though it is otherwise when the action is brought against the ordinary; in which case a title or consideration must be

down in the declaration and proved, as the building or repairing of the pew. (*Kewrick v. Taylor*, 1 Wils. 326; *Ashley v. Preston*, 3 Lev. 73; see *Fiske v. Roitt*, Loft. 423; *Com. Dig. Action upon the Case for Disturbance* (A. 3); *Gibbs*, 197, 184.)

The right to sit in a pew may be apportioned, and therefore given by a faculty, reciting that A. had applied to have a pew appropriated to him in the parish church in respect of his dwelling-house, a pew was granted to him and his family for ever, and the owners and occupiers of the said dwelling-house, which was afterwards divided into two; it was held that the occupier of one of the two (constituting a very small part of the original message) had some right to the pew, and in virtue thereof might maintain an action against a wrong-doer. (*Harvie v. Dyce*, 2 B. & Ad. 164.)

It seems that a bill in equity will not lie to be quieted in the possession of a pew, though there is a decree for it before the ordinary. (*Baker v. Child*, 2 Vern. 226.)

A man may prescribe that he is tenant of an ancient message, and ought to have a separate burial in a particular vault within the church. (*Com. Dig. Cemetery*, (B.)) It seems that the same rules are applicable to vaults as to pews. (*Bryon v. Whistler*, 8 B. & C. 293; *S. C.* 2 M. & Ryf. 318; see *Francis v. Ley*, Cro. Jac. 366; *Gibbs*, Cod. 542.) As to rights of burial, see *Har. Index*, tit. Ecclesiastical Law, XVII., Burial.

7. OF THE RIGHT TO LIGHT AND AIR.

A right to the enjoyment of light and air may commence by mere occupancy. Every man on his own land has a right to all the light and air which will come to him; and he may erect, even on the extremity of his land, buildings with as many windows as he pleases, without any consent from the owner of the adjoining lands. After he has erected his building, the owner of the adjoining land may, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies, from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy his light without obstruction, so long as he shall continue the same mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant; for light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them, more properly arises by a covenant which the law would imply not to interrupt the free use of the light and air. (*Per Littleton*, 3 B. & Cr. 340. See 2 B. & Cr. 691.)

It was held by Lord Ellenborough, C. J., that a party who had granted a *parol* license to erect a skylight could not, after expense had been incurred, recall the license, and treat the party to whom it had been granted as a trespasser for doing such act. (*Winter v. Brockwell*, 8 East, 308; see *Wood v. Lake*, Say. R. 3, ante, p. 52.)

In whatever way precisely the right to enjoy the unobstructed access of light and air from adjoining land may be acquired, (a question of admitted nicety,) still the act of the owner of such land, from which the right flows, must have reference to the state of things at the time when it is supposed to have taken place; and as the act of the one is inferred from the enjoyment of the other owner, it must in reason be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions and in the same position), which existed at the time when such consent is supposed to have been given. It is considered that convenience and justice both require this limitation; if it were once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And in the same case, a party, who had acquiesced in the existence of a window of a given size, elevation or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window to which he might have the greatest objection, and to which he would never have assented, if it had come in question in the first instance. The case of *Chandler v. Thompson*, 3 Camp. 80, is not at all inconsistent with this reasoning. Per Patteson, J. (*Blanchard v. Bridges*, 4 Ad. & El. 191, 192.) There may appear to be some hardship in holding that the owner of a close who has stood by, without notice or remonstrance, while his neighbour has incurred great expense in building upon his own adjoining land, should be at liberty, by subsequent erections to darken the windows, and so destroy the comfort of such buildings. Yet there can be no doubt of his right to do so at any time before the expiration of twenty years from their erection, and this with good reason, for it is far more just and convenient that the party, who seeks to add to the enjoyment of his own land by any thing in the nature of an easement upon his neighbour's land, should first secure the right to it by some unambiguous and well-understood grant of it from the owner of that land, who thereby knows the nature and extent of his grant, and has a power to withhold it, or to grant on such terms as he may think proper to impose, than that such right should be acquired gradually as it were, and almost without the cognizance of the grantor, in so uncertain a manner as to create infinite and puzzling questions of fact to be decided by litigation. (*Blanchard v. Bridges*, 4 Ad. & El. 194.)

If a party, who has neglected to secure to himself the unobstructed enjoyment of light and air to a new window by previous express license or covenant, relies for his title to them upon anything short of an acquiescence of twenty years, the law lies upon him of producing such evidence as leads clearly and conclusively to the inference of a license or covenant. (*Blanchard v. Bridges*, 4 Ad. & El. 195.) And if a deed be not necessary for that purpose, it is obviously advisable to have it. E. being owner of a house enlarged it, and inserted a window at one end, in the part added, and at another end carried out the side walls, between which two windows formerly stood in a straight line five feet, converting this end into a bow, and inserting two bow windows in the same direction, but not in the same situation, as the two former: it was held, that whatever privileges against the obstruction of light the windows of the original house possessed, this privilege did not apply to the three new windows. Before E.'s house was built, the land on which it was built, together with some adjoining land, belonged to R. who conveyed the land on which it was afterwards built to C., and C. agreed to sell to E., who entered and built the house. Afterwards, and before the enlargement above-mentioned, R. joined in a conveyance with C. (each as to his own estate), by which the house with all lights and easements appertaining and an additional part of R.'s land were granted to E. E. having afterwards enlarged (as above described): it was held, that neither R., nor his assignees, were precluded from obstructing the three new windows by building on the land adjoining. After the enlargement E. assigned to O., and R. afterwards assigned an additional piece of the adjoining land to O., this piece lay to the north of O.'s house, and in the conveyance its southern boundary was described to be "the dwelling-house of O.:" it was held, that this did not operate as a recognition of the house in its then state, so as to preclude R. or his assignees from obstructing the new windows by building on other part of the adjoining land south of O.'s house. In the case stated for the court, by which it was agreed that the court might draw conclusions of fact as a jury, it was stated that R., at the time of his original conveyance to C., was desirous of selling his land in building lots. The court refused to take this into consideration, in interpreting the effect of the conveyance, which did not mention this, but called the land conveyed "arable land," and they held that R. was not precluded by this conveyance from obstructing the lights of the house afterwards built. After the conveyance by R. and C. to E., R. was told by E.'s architect, that alterations were going on, but R. did not know the precise alteration intended to be made as to the windows. R. was told of the precise nature of other alterations, to which he assented, reserving to himself leave to build on his own ground, up to the wall of the house, in a part which did not contain the new windows. The court refused to infer as a

fact, such a legal instrument as might be necessary to convey O.'s house into a dominant, and B.'s land into a servient tenement with respect to lights. (*Blanchard v. Briggs*, 4 Ad & El. 176; *Bridges v. Blanchard*, 3 Nev. & M. 691; 1 Ad & El. 536.)

The enjoyment of lights for twenty years without any obstruction from the party entitled to object, has been long held to be a sufficient foundation for raising the presumption of an agreement not to obstruct them. (2 B. & C. 686; *Darwin v. Upton*, cited 3 T. R. 159; 2 Wms. Saund. 175.) Before the stat. 2 & 3 Wm. 4, c. 71, s. 3, *ante*, p. 12, the acquiescence of lessees or tenants for life in the enjoyment of lights did not bind the landlord or reversioner, unless they had knowledge and acquiesced for twenty years, and a presumption against the owner of lands was not so easily inferred in the case of lights as in cases of rights of way or common, where the tenant suffered an immediate injury. Thus it was held that an enjoyment of lights for more than twenty years, during the occupation of the opposite premises by a tenant, did not preclude his landlord, who was ignorant of the fact, from disputing the right to such enjoyment, although he would have been bound by twenty years' acquiescence, after having known that the windows were opened. (*Daniel v. North*, 11 East, 370). The tenant cannot merely by his own admission bind the landlord. (*Reg. v. Bliss*, 7 Ad. & Ell. 554.) So where lights had been enjoyed for more than twenty years, contiguous to land which, within that period, had been glebe land, but was conveyed to a purchaser under the 55 Geo. 3, c. 147, it was held that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed. (*Barker v. Richardson*, 4 B. & Ald. 579. See also *Cross v. Lewis*, 2 B. & Cr. 686.) It will be observed, that by the act 2 & 3 Wm. 4, c. 71, s. 3, *ante*, p. 12, an absolute right to light may be acquired by an enjoyment without interruption for twenty years, as the eighth section of the act, providing for possession during particular estates, does not extend to lights. And since that statute a right to lights may be established upon an enjoyment for nineteen years and a fraction, provided the action be brought before the interruption has continued for the full period of a year. (*Flight v. Thomas*, 3 Per. & D. 442; 11 Ad. & Ell. 688; 5 Jurist, 811, *ante*, p. 15.)

As a man cannot derogate from his own grant, it is well established, that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, neither the vendor nor any one claiming under him can build upon the adjoining land, so as to obstruct or interrupt the enjoyment of those lights. (*Palmer v. Fletcher*, 1 Lev. 122; *Cox v. Matthews*, 1 Vent. 237;

Russell v. Prior, 6 Mod. 116; *Compton v. Richards*, 1 Price, 27; *Swansborough v. Coventry*, 9 Bing. 309; 2 M. & Scott, 262; *Coleman v. Fisk*, 2 Cr. & Jerv. 126.) And upon the same principle, where several adjoining portions of land, on which the building of houses had been commenced, were sold, and by the conditions of sale were to be finished according to a particular plan within the space of two years, it was held that a purchaser of one of the lots could not, by erecting an additional building at the back of his house, obstruct the light from the windows of another purchaser, who had built his house according to the plan, (*Compton v. Richards*, 1 Price, 27); for the lots were sold under an implied condition, that nothing should be done by which the windows for which spaces were then left might be obstructed. (*Ibid.*) And where the plaintiff purchased a house of A., and the defendant at the same time purchased the adjoining land, upon which an erection of one story high had formerly stood, although in the conveyance to the plaintiff his house was described as bounded by building ground belonging to the defendant, it was held, that the defendant was not entitled to build a greater height than one story, if by so doing he obstructed the plaintiff's lights. (*Swansborough v. Coventry*, 9 Bing. 309; S. C. 2 M. & Scott, 362.) A. the owner of two adjoining houses, granted a lease of one of them to B., and afterwards leased the other to C., there then existing in it certain windows. After that B. accepted a new lease of the house from A.; it was held that B. could not alter his tenement, so as to obstruct the windows existing in C.'s house at the time of his lease from A., though the windows were not twenty years old at the time of the alteration. (*Coutts v. Gorham*, 1 M. & M. 396.) So where the owner of a house divided it into two tenements, and demised one of them to the defendant, it was held he was liable to an action on the case for obstructing the windows in the house at the time of the demise, although of recent construction, and there was no stipulation against the obstruction. (*Rivers v. Bower*, 1 Ry. & M. 24.)

Completely shutting up windows with brick and mortar for above twenty years will destroy the privilege of light. (*Lawrence v. Obee*, 3 Campb. 514.) And the right to the use of light and air, which a party has appropriated to his own use, may be lost by mere non-user even for a less period than twenty years, unless an intention of resuming the right within a reasonable time be shown when it ceased to be used. Thus, where a person, entitled to ancient lights, pulled down his house, and erected a blank wall in the place of a wall in which there had been windows, and suffered such blank wall to remain about seventeen years, and the defendant erected a building against it, when the plaintiff opened a window in the same place where there had formerly been a window in the old wall, it was held, in an action for obstructing the light of the new window, that it must, at least, be shown that at the time of the erection of the blank wall, and the apparent abandon-

Right to
lights, how
lost.

ment of the former lights, it was not a perpetual, but a temporary abandonment of the enjoyment, with an intention to resume it within a reasonable time. (*Moore v. Rawson*, 3 B. & Cr. 336; 5 D. & R. 234.) And it was said by Litledale, J., that if a man pulls down a house, and does not make any use of the land for two or three years, or converts it into tillage, he may be taken to have abandoned all intention of rebuilding the house, and, consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does anything to show that he did not mean to convert the land to a different purpose, then his right would not cease. (Id. 341. See *ante*, pp. 65, 66.)

Action for
obstructing
lights.

When a party has acquired a right to the use of light, an action on the case lies for obstructing it. (9 Rep. 59 a; *Boury v. Pope*, 1 Leon. 168.) In order to sustain such an action, it is not necessary to show a total privation of light. If the plaintiff can prove that by reason of the obstruction he cannot enjoy the light in so free and ample a manner as he did before, it will be sufficient. (*Cotterell v. Griffiths*, 4 Esp. N. P. C. 69.) To sustain an action on the case for darkening the plaintiff's windows, it is not sufficient that a ray or two of light should be obstructed. The question is, whether, in consequence of the obstruction, the plaintiff has less light than before, to so considerable a degree as to injure the plaintiff's property in point of value or occupation. (*Pringle v. Wernham*, 7 Carr. & P. 377; *Wells v. Ody*, Id. 410.) If an ancient window be enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light to any part of the space occupied by the ancient window, although a greater portion of light be admitted through the unobstructed part of the enlarged window than was anciently enjoyed, for the original aperture remained privileged as before the enlargement. (*Chandler v. Thompson*, 3 Campb. 80. See 4 Ad. & Ell. 192.) But a party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether. (*Garritt v. Sharp*, 3 Ad. & Ell. 325; 4 Nev. & M. 834.) And if a building, after having been used for twenty years as a malt-house, is converted into a dwelling-house, it is entitled in its new state only to the same degree of light which it possessed in its former state. (*Martin v. Goble*, 1 Campb. 322.) So where an old house is pulled down, and a new one built, the lights in the new house must be in the same place, of the same dimensions, and not more in number than in the old house. (*Cherrington v. Abney*, 2 Vern. 646.) Where one party has the enjoyment of light, and alterations are made in the adjoining buildings, the diminution of light, as a ground of action against the party building, must be such as makes the premises to a sensible degree less fit for the purposes of business or occupation. (*Parker v. Smith and others*, 5 Car. & Payne, 438; *Back v. Stacey*, 2 C. & P. 466.) The opening of a window, whereby the plaintiff's privacy is

disturbed, is not actionable; the only remedy is to build upon the adjoining land, opposite the offensive window. (*Chandler v. Thompson*, 3 Camp. 80; see 9 Rep. 58, b; *Cotterell v. Griffiths*, 4 Esp. N. P. C. 69.) So the building of a wall which merely intercepts the prospect of another, without obstructing his lights, is not actionable. (*Knowles v. Richardson*, 1 Mod. 55; S. C. 2 Keb. 611, 642; see 2 Ves. sen. 453.) It was held in a recent case, that the use of an open space of ground for a purpose requiring light and air, as a timber yard and saw pit, for twenty years, did not give a right to preclude the adjoining owner from building on his land so as to obstruct the light and air. (*Roberts v. Macord*, 1 Moody & Robinson, 230.)

A reversioner may maintain an action for obstructing lights, for if he were prevented from suing for such an injury during the continuance of the lease, he might have great difficulty in proving his right when he came into possession. (*Shadwell v. Hutchinson*, 1 Mood. & Malk. 350. See 3 Taunt. 139.) The ground upon which a reversioner is allowed to bring his action for obstructions apparently permanent to lights and other easements which belong to the premises is, that if acquiesced in, they would become evidence of a renunciation and abandonment. (*Bower v. Hill*, 1 Bing. N. C. 555. See 1 Wms. Saund. 346, b, n.; *Raine v. Alderson*, 6 Scott, 691; 4 Bing. N. C. 702. See *ante*, pp. 70, 83, 86.) And in *Young v. Spencer*, Lord Tenterden said that it seemed to be clearly established, that if anything be done to destroy the evidence of title, an action is maintainable by the reversioner, (10 B. & C. 145,) who may in all cases bring an action where a stranger does an act injurious to the inheritance, and rendering it of less value. (*Jesser v. Gifford*, 4 Burr. 2141.) And if the obstruction be continued, a new action may be maintained notwithstanding the former recovery. (2 B. & Ad. 97.) And the owner of the inheritance of a house may maintain an action against his own lessee for obstructing lights. (*Thomlinson v. Brown*, Bay. R. 215. See also 4 Burr. 2141; 3 Leo. 109.) Such an action may be brought not only against the party who first erected the nuisance, but also against his lessee or assignee for continuing it; (*Roswell v. Prior*, 12 Mod. 636; S. C. 2 Salk. 460; 1 Ld. Raym. 713. See also Carth. 456; 1 Keb. 794); but after damages have been recovered from the lessor, the right of action against the lessee will be barred, as but one satisfaction will be given, (12 Mod. 640; Carth. 456,) unless a continuance of the nuisance be laid in the declaration. Not only the person who erected the obstruction, and the occupier of the premises where it is erected, but even the workmen who performed and the clerk who superintended the works, are liable to an action. (*Wilson v. Peto and Hunter*, 6 B. Moore, 47.)

The Court of Chancery will grant an injunction to restrain the owner of a house from making any erection or improvement which would prevent stopping lights.

ments, so as to darken or obstruct the ancient lights or windows of an adjoining house. (*Back v. Stacey*, 2 Russ. 121.) In a plain case of a nuisance for stopping up lights, an injunction may be granted upon affidavit, notice, and certificate; but it was refused where the application proceeded merely on a particular right to a long enjoyment of a prospect. (*Attorney-General ex rel. Gray's Inn v. Doughty*, 2 Ves. sen. 453. See *Squire v. Campbell*, 1 M. & Cr. 459.) The right to lights as a ground for an injunction to stop the erection of buildings, must be founded on prescription, or else on some agreement or a reasonable presumption of one. (*Morris v. Lessees of Lord Berkeley*, 2 Ves. sen. 452.) Where land is conveyed in fee by deed of feoffment, subject to a perpetual ground-rent, and the feoffee covenants for himself, his heirs and assigns, with the feoffor, the owner of adjoining land, his heirs, executors, administrators, and assigns, not to use the land in a particular manner, with the view to the more ample enjoyment by the feoffor of such adjoining lands, and the subsequent acts of the feoffor, or of those claiming under him, have so altered the character and condition of the adjoining lands that, with reference to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent and spirit of the contract, a court of equity will not interpose to enforce the covenant by granting an injunction to restrain the erection of additional buildings, but will leave the parties to their remedy (if any) at law. (*The Duke of Bedford v. The Trustees of the British Museum*, 2 M. & Keen, 552.) The foundation of the jurisdiction to interfere by injunction in these cases is such material injury to the comfort of those who dwell in the neighbouring house, as to require the application of a power to prevent as well as to remedy an evil, for which damages more or less would be given at law, but the court will not interfere upon every degree of darkening ancient lights, nor in every case where an action may be maintained. (*Attorney-General v. Nicholl*, 16 Ves. 338.) Courts of equity will restrain the erection of buildings which would cause irreparable injury, as loss of health, loss of trade, or destruction of the means of existence, without waiting the slow process of establishing the legal right when delay itself would be a wrong; but the plaintiff is bound to show not only a legal right to the enjoyment of the ancient lights, but that if the building of the defendant is suffered to proceed, such an injury will ensue as warrants the court to interpose. (*Wynstanley v. Lee*, 2 Swanst. 335, 336.) But although it be perfectly clear that the plaintiff is entitled to succeed in an action of trespass, a court of equity will not interfere by injunction where the nature or degree of injury is not such as to require that extraordinary relief. (*Attorney-General v. Nicholl*, 1 Dick. 164.) An injunction against obstruction of ancient lights was granted on affidavit before appearance and without notice to the defendant, although the plaintiff had previously to the filing of the bill commenced

an action at law. (*Attorney-General v. Nicholl*, 3 Mer. 687.) But the injunction was afterwards dissolved, on the defendant's undertaking, if the verdict at law should be against him, to remove the injury. (S. C. 16 Ves. 338.) But the court will not interpose on certificate of bill filed before answer, unless the injury is of a nature so pressing as not to admit of delay. (2 Swanst. 337. See *Chalk v. Wyatt*, 3 Mer. 688.) And such an injunction is sometimes granted until after a trial at law directed by the court. (*Attorney-General v. Bentham*, 1 Dick. 277. See *Ryder v. Bentham*, 1 Ves. sen. 543.) An injunction was granted to prevent the stopping of ancient lights against a lessee of an ecclesiastical corporation, subject to the plaintiffs establishing their right to the easement in an action. Upon a motion to dissolve the injunction, Sir L. Shadwell, V. C., after referring to the case of *Attorney-General v. Nicholl*, and remarking that the building would materially affect the comfort of the houses in which the windows were, said, "I have, therefore, a case before me, in which, according to my opinion, upon the simple question of nuisance, the building, if completed, would be a nuisance, and in which it is not by any means clear that the Dean and Chapter of Westminster would have a right to erect the building proposed, and in which it appears that Lady Montfort may not have that right, even though the Dean and Chapter may have it, I think, therefore, the injunction should be continued, though the matter must be tried." (*Sutton v. Lord Montfort*, 4 Sim. 559. See *ante*, 88.)

By the custom of London, which is stated in the case of *Wynstanley v. Lee*, (2 Swanst. 339, 340,) an occupier of a house there had not an absolute property in the enjoyment of his share of light, whatever it might be, but the owner of the adjoining house, or site of houses, might build to any height, and to the obstruction of his light, unless he was precluded by some writing between them. And the custom was not repealed merely by the length of time during which one party enjoyed and the other acquiesced in such enjoyment. (2 Swanst. 341. See *Privilegia Londini*, p. 101, cited *Moed. & Malk.* 351; and see *Godb.* 183; *Yelv.* 215; 1 Bulstr. 115; *Com. R.* 273; 1 Burr. 248; 3 Carr. & P. 317; *Shadwell v. Hutchinson*, 3 C. & P. 615; *M. & M.* 350; 2 B. & Ad. 97.) The statute 2 & 3 Wm. 4, c. 71, s. 3, has taken away the custom of London as to lights. (*The Salters' Company v. Jay*, Q. B. 3d May, 1842.)

*This Act amended after
1 Jan'y 1879 by Act passed
Union C. 1874*

LIMITATION OF ACTIONS AND SUITS.

3 & 4 WILLIAM IV. c. 27.

An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto.

[24th July, 1833.]

DEFINITIONS.

Meaning of
the words in
the act.

"Land."

"Rent,"

Person
through
whom an-
other claims.

BE it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions herein-after mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" (*a*) shall extend to manors, messuages, and all other corporeal hereditaments whatsoever (*b*), and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), (*c*) and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest (*d*), and whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots (*e*), and to all services and suits (*f*) for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim, shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir,

issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat (*g*), and the word "person" shall extend to a body politic, corporate, or collegiate (*h*), and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Number and gender.

(*a*) Turnpike tolls are not within this act, and consequently What sub-
more than six years arrears of interest may be recovered on a jects are and
mortgage of turnpike tolls notwithstanding the 42d section of are not in-
the act. A share of the tolls of a turnpike road not coming act. cluded in this
within the meaning of the word *land* as defined by the first section of this act. (*Mellish v. Brooks*, 3 Beav. 22; 4 Jurist, 739.)

Notwithstanding the extensive meaning given to the word rent by this section, the second section of the act does not include rents reserved on leases for years. (*Grant v. Ellis*, in Exch. November 9, 1841. See post, p. 122.)

Tithes, moduses, or compositions, belonging to a spiritual or eleemosynary corporation sole, are excepted from the operation of this act. The stat. 2 & 3 Will. 4, c. 100, limits the time for establishing all prescriptions of or for any modus decimandi, or of or to any exemption or discharge of tithes by composition real or otherwise. The time for recovering lands belonging to such a corporation is prescribed by 3 & 4 Will. 4, c. 27, s. 29.

Considerable doubt had been expressed whether the stat. 3 & 4 Wm. 4, c. 27, extends to any legacies which are not charged on land. The title of the act is "an act for the limitation of actions, &c., relating to *real property*;" all the sections preceding the 40th are conversant about some proceedings relating to land, as well as the subsequent sections, except the 42d and the 43d. (See *Paget v. Foley*, 2 Bing. N. C. 679; 3 Scott, 120; 1 Jebb & Symes, 343.)

It has been decided that the 40th section of this act applies to legacies payable out of personal estate, (*Sheppard v. Dukes*, 9 Sim. 567; *O'Hara v. Creagh*, 1 Longfield & T. 65.) and residuary property. (*Prior v. Horniblow*, 2 Y. & Coll. 200. See *Phillips v. Munnings*, 2 M. & Cr. 309; *Campbell v. Sandford*, 8 Bligh, N. S. 622.)

Charities were not within the statutes of limitations, 32 Hen. 8, c. 2, and 21 Jac. 1, c. 16; (Duke, 161; *Att.-Gen. v. Mayor of Coventry*, 3 Madd. 368; 2 Vern. 399; *Att.-Gen. v. Christ's Hospital*, 3 My. & K. 344; *Att.-Gen. v. Mayor of Bristol*, 2 Jac. & W. 321; *Att.-Gen. v. Poulden*, 8 Sim. 472.) Cases of charity are neither included nor excluded by express words from the stat. 3 & 4 Wm. 4, c. 27; in a recent case, *Sugden, L. C.*, said "I am not called on to decide this question, but my impression is, whether purposely or not, that charity is a *casus omisus* from this act of parliament" (*Incorporated Society v. Richards*, 1 Connor & Lawson, 83.)

Hereditaments.

(b) Hereditament is a very comprehensive term, including whatever may be inherited, be it corporeal or incorporeal, real, personal, or mixed. (Co. Litt. 6a; 3 Rep. 2; Shepp. T. 91.) *Hereditaments* are of two sorts, *corporeal*, consisting wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land. (Co. Litt. 4; 2 Bl. Comm. 17.) An *incorporeal* hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within the same. (Id. 20.) The latter are not within this act, but the period of limitation for incorporeal rights is prescribed by the statute 2 & 3 Wm. 4, c. 71; (*ante*, pp. 1—27.)

Different kinds of corporations.

(c) *Ecclasiastical corporations* are those of which not only the members composing it are spiritual persons, but of which the object of the institutions is also spiritual, such as bishops, some deans and prebendaries, all archdeacons, parsons, and vicars which are *sole corporations*, deans and chapters at present, and formerly prior and convent, abbot and monks, and the like bodies aggregate. (Co. Litt. 150a; 1 Bl. Comm. 471; 1 Kyd on Corporations, 22.)

Eleemosynary corporations are such as are constituted for the perpetual distribution of the free-alms or bounty of the founder of them, to such persons as he has directed. (1 Bl. Comm. 471.) These are of two general descriptions; hospitals for the maintenance and relief of poor and impotent persons, and colleges for the promotion of learning, and the support of persons engaged in literary pursuits, of which the greater number are within the universities, and form component parts of these larger corporations; and others are out of the universities, and not necessarily connected with them. Between hospitals having a common seal, and colleges in the universities or out of them, there is no difference in legal consideration, the difference is only in degree; for where in an hospital the master and poor are incorporated, it is a college having a common seal by which it acts, although it have not the name of a college. (*Per Holt*, Skinn. 484.) There are many hospitals not incorporated in which the succession is kept up by trustees. (10 Rep. 31, 35.) There are other corporations which may be classed under the head of *eleemosynary*, as their object is, by means of trustees or governors incorporated, to carry into execution some public charity; such is the

corporation created in the reign of Queen Anne, under the name of "the governors of the bounty of Queen Anne, for the augmentation of the maintenance of the poor clergy." (2 Anne, c. 11; 5 Anne, c. 24; 6 Anne, c. 27; 1 Geo. 1, stat. 2, c. 10; 3 Geo. 1, c. 20.) And such are many corporations of trustees or governors of free schools. (See 1 Kyd on Corp. 25-27.) All these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, (1 Ld. Raym. 6,) and although they, in some things, partake of the nature, privileges, and restrictions of ecclesiastical bodies. (1 Bl. Comm. 471.) Each university of Oxford and Cambridge is a *lay* corporation and not eleemosynary, as particular colleges are, although some salaries are attached to some of their officers. (*Rex v. Vice-Chancellor of Cambridge*, 3 Burr. 1662. See Shelford on the Law of Mortmain and Charities, 8-34.)

Corporations *aggregate* consist of many persons, of which kind are the mayor and commonalty of a city, the head and fellows of a college, the master and brethren of an hospital, the dean and chapter of a cathedral church. (10 Rep. 29 b; 11 Rep. 69 b.)

Corporations *sole* consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a corporation sole. (Co. Litt. 43.) So are archbishops, bishops, deans and prebendaries, distinct from their several chapters; and so is every parson and vicar. (10 Rep. 29 b; Wood's Inst. 169; 1 Bl. Comm. 470; 1 Kyd on Corp. 20.)

(d) The term *freehold*, as denoting an estate of a given quantity, or rather of a peculiar quality, is opposed to the term *chattel*. (Co. Litt. 43 b; 1 Burr. 108.) An estate of freehold may be defined to be "an estate in possession, remainder, or reversion, in corporeal or incorporeal hereditaments, held for life, or some uncertain interest, created by will, or some other mode of conveyance, capable of transferring an estate of freehold, which may last the life of the devisee or grantee, or of some other person." (Watk. on Conv. by Morley and Cooke, 63; Prest. on Estates, 200-203. See observations on an estate of freehold by Manning, 2 Jur. p. 459.) All interests in land for a shorter period than a life, or, more properly speaking, all interests for a definite space of time, measured by years, months, or days, are deemed *chattel* interests, (1 Prest. on Estates, 203,) which may subsist in both corporeal and incorporeal hereditaments. (Noy's Maxims, by Bythewood, 142, 357; Bac. Abr. Executors, (H. 3.)) Chattels real are such as concern the realty, as terms for years of land, the next presentation to a church, (Dyer, 136 a,) estates by a statute-merchant, statute-staple, elegit, or the like. (Co. Litt. 118 b.) By the common law no estate of inheritance or freehold is comprehended under the word chattels. (Id.) Where a

Meaning of the term "Freehold."

testator devises lands to his executors for payment of his debts, or until his debts are paid, the executors only take an estate for so many years as are necessary to raise the sum required. (Co. Litt. 42 a; 8 Rep. 96 a; 1 P. Wms. 509.) It is the same where an estate is devised till such time as a particular sum shall be raised out of the rents and profits thereof. (*Corbet's case*, 4 Rep. 81 b; 1 P. Wms. 518; Co. Litt. 45 b.; Com. Dig. Biens, (A. 1.))

Heriots.

(e) Heriot is defined to be the best beast, or other thing, due to the lord on the death or alienation of his tenant. Heriots are usually divided into two sorts, heriot *service*, and heriot *custom*. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent; (*Lanyon v. Carne*, 2 Saund. 166); the latter arise upon no special reservation whatever, but depend merely upon immemorial usage and custom. (Co. Cop. s. 24.) Heriot *service* may be recovered either by seizure, (Plowd. 96; Cro. Eliz. 589; 1 And. 298; Gouldsb. 191; 1 Salk. 356; 1 Show. 81; Willes, 192); or by distress within the manor. (Plowd. 96 a; Cro. Car. 260; Bro. Har. 2; Kich. 133 b; 3 Bl. Comm. 15; Gilbert's Distresses, 10, 11.) Any goods belonging to another, found upon the lands charged with heriot service, may be distrained. (Bro. Har. 6; Cro. Car. 260; *Austin v. Bennet*, 1 Salk. 356.) A heriot due by the *custom* of a manor may be payable on the death of every tenant of an estate of inheritance, or for life or years, (21 Hen. 7, 13 & 15; Keilw. 80; Bro. Har. 5); or at will. (*Hiz v. Gardiner*, 2 Bulstr. 196.) As the property of it vests immediately in the lord on the death or alienation of the tenant, the lord may seize the identical thing, though he cannot distrain any other chattel for it. (Cro. Eliz. 590; Keilw. 82 a, 84 b, 167 a; Br. Har. 2, 6, 7; *Parker v. Gage*, 1 Show. 81.) If the lord of a manor is entitled to five beasts as heriots on the death of a tenant, and he selects seven, this selection will not vest in him the property in any five of them. And if the best beast may be claimed as a heriot, the property in any particular beast will not vest in the lord before selection of it. (*Arington v. Lipscomb*, 6 Jur. 257. See stat. 4 & 5 Vict. c. 35, providing for the commutation of manorial rights in respect of copyholds. See further as to heriots, 2 Watk. on Cop. c. 6; 2 Saund. Rep. 168 n.; Cruise Dig. Tit. 10, c. 4, ss. 49—63; Com. Dig. Copyhold, (K 18,) (K 27); Scriven on Cop. 437—465, 3rd ed.; *Croome v. Guise*, 4 Bing. N. C. 148; 5 Scott, 453.)

Different kinds of rents.

(f) A rent (*reditus*) is, properly, a sum of money or other thing to be rendered periodically, in consequence of an express reservation in a grant or demise of lands or tenements, the reversion of which is in the grantor or person demising. (2 Bl. Comm. 41; Gilb. on Rents, p. 9, &c.) There are at common law three sorts of rents: rent-service, rent-charge, and rent-seck. (Litt. s. 213.) Rent-service is so called because it hath some corporeal service incident to it,

as at least fealty or the tenant's feudal oath of fidelity. (Co. Litt. 142.) For if a tenant holds his land by fealty and ten shillings rent; or by the service of ploughing the lord's lands and five shillings rent; these pecuniary rents being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or in arrear, at the day appointed, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. (Litt. s. 215.) A *rent-charge* is where the owner of the rent hath no future interest or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind, it shall be lawful to distrain for the same. In this case the land is liable to distress, not of common right, but by virtue of the clause in the deed, and therefore it is called a *rent-charge*, because in this manner the land is charged with a distress for the payment of it. (Co. Litt. 143.) *Rent-seck*, (*redditus siccus*), or barren rent, is, in effect, nothing more than a rent reserved by deed, but without any clause of distress. (2 Bl. Comm. 42.) Either a rent-service disconnected from the reversion, (*Ards v. Watkin*, Cro. Eliz. 637, 651,) or a rent charge may be divided by will or by deed, operating under the statute of uses, so as to make the tenant liable without attornment to several distresses by the devisees or cestuis *que us*. It seems that since the stat. 4 Anne, c. 16 s. 9, a rent charge may be so divided by a conveyance of any kind. (*Rivis v. Watson*, 5 Mees. & W. 255. See *Colborne v. Wright*, 2 Lev. 239.)

There are also other species of rents, which are reducible to these three. Rents of *assise* are the certain established rents of the freeholders and ancient copyholders of a manor, (2 Inst. 19,) which cannot be departed from or varied. Those of the freeholders are frequently called *chief* rents, (*redditus capitales*); and both sorts are indifferently denominated *quit-rents*, (*quiti redditus*), because thereby the tenant goes quit and free of all other services. A *fee-farm* rent is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands at the time of its reservation. (Co. Litt. 143.) For a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee-simple instead of the usual method, for life or years. (2 Bl. Com. 43.) An opinion is expressed by Mr. Hargrave, (Co. Litt. 143 b. n. 5.) that the true meaning of *fee-farm* is a perpetual farm or rent, the name being founded on the *perpetuity* of the rent or service, and not on the *quantum*; and that the term is not applicable to any rents except *rent-service*, where he differs from Mr. Douglas, who had thought that a *fee-farm* was not necessarily a rent-charge, but might also be a rent-seck. (*Bradbury v. Wright*, Dougl.

Distress for
rents.

627, n. 1.) These are the general divisions of rent; but the difference between them (in respect of the remedy for recovering them) is now abolished. By stat. 4 Geo. 2, c. 28, s. 5, the same remedy was given by distress, and by impounding and selling the same, in cases of rents-seck, rents of assize, and chief-rents, which had been duly answered before the first day of that session of parliament, or should be thereafter created, as in case of rent reserved upon lease. (See Doug. 627.) It is clear, if a lessee for years assign his term, reserving a rent, with no clause of distress, he cannot distrain for the rent either by the common law or by the statute, (— v. *Cooper*, 2 Wils. 375; *Permenter v. Webber*, 2 B. Moore, 666. See 4 Taunt. 720; 8 Taunt. 593,) although he may re-enter on the breach of a condition. (*Doe v. Bateman*, 2 B. & Ald. 168.) A. being seised in fee, leased premises to B. for sixty-one years, and afterwards granted a lease to C. of the same premises, to commence at the expiration of the sixty-one years; it was held, that A. had not parted with his reversion by the lease to C., so as to take away his right to distrain for rent due from B. under his lease. (*Smith v. Day*, 2 Mees. & W. 694.) A rent-charge granted for life by a tenant for years is good as a chattel interest, and the goods of a stranger not shown to hold the premises by title paramount to the rent-charge, (as by a prior demise) may be distrained for the arrears. (*Saffery and others v. Elgood and another*, 1 Ad. & Ell. 191.) An agreement for a future lease, at a rent certain, is not a sufficient reservation of rent, and will not constitute a demise; and where a party is let into possession under such an agreement, the lessor cannot distrain, but must resort to his action of use and occupation. (*Hagan v. Johnson*, 2 Taunt. 148; *Dunk v. Hunter*, 5 B. & Ald. 322.)

Right of
executors to
distrain.

It was held, that the executor of a person who was seised in fee of land, and demised it for a term of years, reserving a rent, could not distrain for arrears of rent accrued in the testator's life-time; for the latter was not a tenant in fee-simple of a rent, within the meaning of the stat. 32 Hen. 8, c. 37, s. 1. (*Prescott v. Boucher*, 3 B. & Ad. 849. See the cases on this subject collected and reviewed in 1 Wms. on Executors, 602, &c.) But by stat. 3 & 4 W. 4, c. 42, ss. 37, 38, the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for the arrears due to such lessor or landlord in his life-time, in like manner as such lessor or landlord might have done in his life-time. (s. 37.)

Distress after
end of term.

And such arrears may be distrained for after the determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined; provided such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; and all powers and provisions in the several statutes made relating to distresses for

not, are made applicable to the distresses so made as aforesaid. (a. 38.)

It has been decided, that a distress may be taken for arrears of a rent-charge created by will, although the testator does not in terms give a power to distrain, such power being a consequence drawn by law from the rent-charge. (*Rodham v. Berry*, K. B. April, 1826: *Watk. Conv.* by *Cov.* 243, n. (a.)) Where there was a devise of lands to A. for life, remainder to B. in fee, charged with the payment of 20l. a-year to C. during her life, to be paid by A. as long as she should live, and after her decease to be paid by B.: it was held, that the annuity was a charge on the estate, and that C. might distrain for the arrears, although the will contained no power of distress. (*Buttery v. Robinson*, 3 Bing. 392; 11 Moore, 262.) A rent for equality of partition is not a rent-service, but a rent-charge of common right, and therefore may be distrained for. (*Litt.* a. 253.)

Right to distrain for annuity given by will.

Rent cannot issue out of an incorporeal hereditament, so as to warrant a distress, which can only be made in respect of a fixed ascertained rent reserved out of land. (2 Barn. & Ad. 338.) A rent could not formerly be reserved out of an advowson in gross, tithes, or any other incorporeal hereditament. (*Co. Litt.* 47 a, 142 a; *Gilb. on Rents*, 20, 22.) A rent cannot be reserved out of a rent; (2 Roll. Abr. 446; *Keilw.* 161;) nor out of a mere privilege or easement in land. (*Buxard v. Capel*, 8 B. & Cr. 141.) Part of a rent may be granted, although it cannot be reserved out of an old rent. (2 Ves. sen. 178.) A rent may be reserved upon a grant of an estate in remainder or reversion, for the remedy by distress will arise when the lessee comes into possession (*Co. Litt.* 47 a) for all the arrears. (2 Roll. Abr. 446.) And by stat. 11 Geo. 2, c. 19, s. 8, a landlord may distrain any cattle feeding upon a common appurtenant to the land demised. By stat. 3 & 4 Will. 4, c. 42, s. 3, actions of debt for rent upon an indenture of demise must be commenced within ten years after the 10th of August, 1833, or within twenty years after the cause of action. (See post.)

Rents not issuable out of incorporeal hereditaments.

A lease by a bishop of tithes only, rendering the ancient rent, was held void against the successor, because there was no remedy for the rent by distress or assize. (*Tanlinstons v. Denton*, Cro. Jac. 111; *Dean and Chapter of Windsor v. Gover*, 2 Wms. Saund. 230.) But by stat. 5 Geo. 3, c. 17, all leases for one, two, or three lives, or for any term not exceeding twenty-one years of any tithes, tolls, or other incorporeal hereditaments without any lands, by any bishop, college, or hall, dean and chapter, precentor, prebendary, hospital, or any other person, who is enabled by statute to make such leases of any corporeal hereditaments, are as effectual against the lessors and their successors, as any leases of corporeal hereditaments are by virtue of 32 Hen. 8, c. 28, and an action of debt against the lessee is given for the recovery of such rent. It is perfectly

clear that, in point of law, tithes, being an incorporeal hereditament, cannot pass by parol, but by deed only. Therefore where, by an instrument not under seal, A. agreed to let to B., on lease, the rectory of L., and the tithes arising from the lands in the parish of L., and also a messuage used as a homestead for collecting the tithes, at a yearly rent of 200*l.*; the rent being in arrear, A. distrained, and B. having brought trespass, it was held that the distress was altogether unlawful, because the agreement not being under seal, did not operate as a demise of tithes, and no distinct rent was reserved for the homestead. (*Gardiner v. Wilkinson*, 2 Barn. & Ad. 336.)

The king may reserve a rent out of an incorporeal hereditament, as well as out of lands, because by his prerogative he may distrain for such rent on all the lands of his tenant. (Co. Litt. 47 a.; 2 Inst. 132; 5 Rep. 4; Gilb. on Rents, 22.) And it was held that the grantee of fee-farm rents from the crown might exercise the same power. (1 P. Wms. 306.)

Old Limita-
tion Act as
to rents.

By stat. 32 Hen. 8, c. 2, s. 4, (10 Car. 1, sess. 2 c. 6, Irish,) it was enacted, that no persons should make any avowry or cognizance for any rent, suit, or service, and allege any seisin of any rent, suit, or service in the same avowry or cognizance, in the possession of his or their ancestors or predecessors, or in his own possession, or in the possession of any other whose estate he shall pretend or claim to have above fifty years next before the making of the said avowry or cognizance. This provision was held to apply only where it was necessary to allege seisin, and not where rent was expressly created by deed, the commencement whereof could be shown, (Co. Litt. 115 a.; 8 Rep. 64,) or by act of parliament, (*Faulkner v. Bellingham*, Cro. Car. 80,) or by will, (*Collins v. Goodall*, 2 Vern. 235,) as to which there was no prescribed period of limitation, either at law or in equity. (*Cupit v. Jackson*, M'Cle. 495; S. C. 13 Price, 721; and *Stackhouse v. Barnston*, 10 Ves. 467.) So that arrears for any number of years might have been recovered unless there was evidence to raise a presumption of payment. (10 Ves. 467.) But mere length of time, short of fifty years, the period fixed by the stat. 32 Hen. 8, c. 2, and unaccompanied with other circumstances, was not of itself sufficient ground to presume a release or extinguishment of a quit-rent. (*Eldridge v. Knott*, Cowp. 214, cited 10 Ves. 467, 468.)

Escheat.

(g) An *escheat* was in its nature feudal. A feud was the right which the tenant had to enjoy lands, rendering to the lord the duties and services reserved to him by contract. After a grant made, a right remained in the lord, called a *seignory*, consisting of services to be performed by the tenant, and a right to have the land returned on the expiration of the grant as a reversion, called an *escheat*. (*Burgess v. Wheate*, 1 Eden, 191.)

Escheat is founded on the principle that the blood of the person last seised *in fee* is by some means utterly extinct and gone; and since none can inherit his estate, but such as are of

his blood and consanguinity, it follows as a regular consequence that the inheritance must fail. (2 Inst. 64; Wright's Ten. 115.) Escheat may happen from default of heirs, as where the tenant dies without any relations on the part of any of his ancestors, or where he dies without any relations on the part of those ancestors from whom the estate descended, or where until the stat. 3 & 4 Will. 4, c. 106, s. 9, (see *post*,) he died without any relations of the whole blood. An escheat may also arise from the corruption of the tenant's blood consequent upon an attainder for treason or felony, by which he becomes incapable of inheriting, and, until recently, of transmitting any thing by heirship. (See 3 & 4 Will. 4, c. 106, s. 10, and note *post*. On the subject of escheat, see 2 Bl. Com. 241—257; Cruise's Dig. tit. xxx; Harg. Co. Litt. 18, b. n. (2); *Heachman v. Attorney-General*, 2 Sim. & Str. 498; as to escheat and forfeiture, see *post*, stat. 4 & 5 Will. 4, c. 23, and notes.)

(A) The king having the prerogative of not being included within the words "person or persons, bodies politic or corporate," used in an act of parliament, whether affirmatively or negatively (11 Rep. 68,) is not bound in his public capacity by the general words of an act of parliament, unless named, (7 Rep. 32; 11 Rep. 68; Plowd. 240; 1 Str. 516; 1 Show. 464; Show. P. C. 185; *Hall v. Maule*, 4 Ad. & Ell. 284; *Rex v. Wright*, 1 Ad. & Ell. 434;) except where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, when the king is bound, though not particularly named. (Plowd. 136, 137; 11 Rep. 68, b; 5 Rep. 14; 7 Rep. 32. See Bac. Abr. Prerogative, (E).) But where a statute is general, and its effect would be to deprive the king of any prerogative, right, title, or interest, he is not bound unless specially named, (11 Rep. 68,) and was held not to be within the statute of limitations, (Br. St. Lim. 67,) nor the statute of 13 Edward 1, st. 1, c. 5, which makes plenary for six months a good plea in *quare impedit*. (11 Rep. 68; Plowd. 244.)

As the king is not particularly named in this act, it is conceived that he is not included in the words "body politic;" and that the period of limitation as to rights of the crown is not altered by it. The king comes expressly within the provisions of the prescription act 2 & 3 Will. 4, c. 71, (see *ante*, pp. 1, 5,) and the stat. 2 & 3 Wm. 4, c. 100, for shortening the time required in claims of modus or discharge from tithes.

By stat. 21 Jac. 1, c. 2, the king was disabled from claiming any manors, lands, or hereditaments, except liberties and franchises, under a title accrued sixty years before the then session of parliament, unless within that time there had been a possession under such title; but this provision becoming daily more ineffectual by lapse of time, a permanent limitation was introduced. (See Co. Litt. 119 a, n. (1.); 3 Inst. 188.)

King when bound by acts of parliament.

Limitation as to rights of the crown.

And by statute 9 Geo. 3, c. 16, it is provided that the king shall not sue, &c. any persons, &c. for any lands, &c. (except liberties and franchises) on any title which has not first accrued within sixty years before the commencement of such suit, unless he has been answered the rents within that time, or they have been in charge, or stood *in asper* of record; and the subject shall quietly enjoy against the king, and all claiming under him by patent, &c. The statute does not extend to estates in reversion or remainder, or limited estates, and contains several provisos and exceptions. Where it appeared in evidence that although the tithes in question had been constantly leased, but neither the crown nor its lessees had received any tithes, or compensation in lieu of them, since 1715, it was held that the accounts of the auditors of the revenue, in which the tithes had been entered and returned *nil* from 1729 to the time of the institution of the suit, were sufficient proof that they had been "duly in charge," so as to protect the claim of the crown from the operation of the statute. But the court doubted whether the mere act of granting leases of the tithes, none having been received by the crown or its lessees since the year 1715, would have been sufficient to keep up the title of the crown, if the tithes had not been constantly kept in charge. (*Atty. Gen. v. Lord Eardley*, 8 Price, 73; 8 C. Dan. 271; 3 E. & Y. 986. See 3 Inst. 189, as to the meaning of "being in charge.") The statute 9 Geo. 3, c. 16, does not give a title, it only takes away the right of suit of the crown, or those claiming from the crown, against such as have held an adverse possession against it for sixty years. (11 East, 495.) Although it was held that possession of crown land, commencing at least fifty-five years ago, by encroachment on the crown in the time of the lessor of the plaintiff's father, maintained by the father till his death nineteen years before the action, and afterwards continued for two years by his widow, when the defendant obtained possession, would have been sufficient evidence for the jury to presume a grant from the crown to the lessor's father, if the crown had been capable of making such a grant, in order to support a demise in ejectment from the eldest son and heir of such first possessor, against the defendant, who had no apparent title, and whose possession was not defended by the crown, nor found to be by license from it. (*Goodtitle dem. Parker v. Baldwin*, 11 East, 488.) But the grant was not presumed in this case, because it would have been against the express provisions of an act of parliament. (*Id.* 495.) By stat. 21 Jac. 1, c. 14, s. 1, it is enacted, "That whosoever the king, his heirs or successors, and such from or under whom the king claimeth, and all others claiming under the same title under which the king claimeth, hath been or shall be out of possession by the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements, or hereditaments, within the space of twenty years before any information or intrusion brought or to be brought to recover the same: that in every

such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially; and that in such cases the defendant or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found, or adjudged for the king." Although the king can never be put out of possession in point of law by the wrongful entry of a subject, yet there may be an adverse possession in fact against the crown. Therefore after such an adverse possession by a subject for twenty years, the crown could only recover land by information of intrusion; consequently ejectment would not lie at the suit of the grantee of the crown, notwithstanding the rights of the crown are not barred by the statute of limitations. (*Doe d. Watt v. Morris*, 2 Scott, 276; 2 Bing. N. R. 189.)

The title of the crown to lands, of which it has been out of possession for twenty years, may be tried in the information of intrusion itself, and need not be first found by inquest of office, the only effect of the statute 21 Jac. 1, c. 14, being to throw the onus of proving title in the first instance, in such a case, on the crown. (*Attorney-General v. Parsons*, 2 Mee. & W. 23.)

Although the statute of limitations does not bind the crown, yet where the claim of the crown is only a derivative right, it must stand in the same situation as its principal. Therefore, the statute of limitations may be pleaded to a *scire facies* issued by the crown against the drawer of a bill of exchange which was barred in the hands of the crown debtor upon the ground that the crown is only entitled to its debtor's right, and cannot create or reserve a right, if none existed, or it has become barred; and that as the crown debtor could not have recovered if the statute had been pleaded, so neither could the crown, standing in the same situation as its debtor. (*Rae v. Morrell*, 6 Price, 24.) But where a right has vested in the crown before the statute has run against the former owner, the rights of the crown are not barred or affected by the statute of limitations, as the crown is not within its operation. (*Lambert v. Taylor*, 4 Barn. & Cress. 138. See *Taylor v. Attorney General*, 10 Sim. 413, as to course of proceeding by a subject to enforce a claim of property against the crown.)

But though the crown was not bound by the statute of limitations, yet a grant from it may be presumed from great length of possession, not because the court really thinks a grant has been made, because it is not probable a grant should have existed without its being upon record; but they presume the fact for the purpose and from a principle of quieting the possession. (*Corporation of Hull v. Horner*, Cowp. 102, 215.) Thus grants from the crown of markets and the like, after an uninterrupted enjoyment of twenty years, (11 East, 419,) have been presumed. So an enfranchisement of a copyhold may, upon sufficient evidence, be presumed against the crown. (*Ex dem. Johnson v. Ireland*, 11 East, 280.) So where the

Presumption
of grants from
the crown.

title of a family to an advowson was evidenced by deeds and conveyances for a period of nearly 140 years, and there had been three presentations by them and none by the crown, it was held that a grant from the crown might be presumed. (*Gibson v. Clark*, 1 Jac. & Walk. 159. See 3 T. R. 158.) In a case where Charles I had granted the soil between high and low water marks along the coast of the county of Southampton, but no possession had been taken of the spot in question under the grant until 1784, the crown having remained in possession for upwards of 150 years after the grant, this was held to create a presumption against it, and the parties not having been in possession more than nineteen or twenty years, no title was gained by adverse possession against the crown. (*Parmeter and others v. Attorney-General*, 1 Dow, 316.) Enjoyment of property for 110 years by a parish, although no conveyance appeared in evidence, was held to be conclusive proof of ownership against purchasers from the crown, relying upon a parliamentary survey and the court rolls of a manor, to show that the right to the property had formerly been in the crown. (*Attorney-General v. Lord Hotham*, 1 Turn. & Russ. 210.) But although grants on record have been presumed, there seems to be no instance of the presumption of an inrolment of a deed. (3 B. & Ald. 151; 10 East, 409; 1 Jac. & Walk. 619.) And an objection to a title that two fee farm rents, created by letters patent by James I, were not shown to have been extinguished, was overruled; it being proved that no claim had been made by the crown of the rent from the year 1706, and no proof of any previous claim. (*Simpson and others v. Gutteridge and others*, 1 Madd. 609.) By stat. 3 & 4 Will. 4, c. 99, ss. 12, 13, quit rents and other rents payable to the crown in respect of any honours, manors, lands, and hereditaments in England or Wales, are placed under the management of the Commissioners of Woods and Forests and Land Revenues, and the Lord High Treasurer, or the Commissioners of the Treasury, are empowered, by warrant under his or their hands, to remit, release, or discharge all or any of the same rents, and the arrears thereof.

TIME OF LIMITATION FIXED.

Twenty Years.

No land or rent to be recovered but within twenty years after the right of action accrued to the claimant,

II. And be it further enacted, that after the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next

after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same (i).

or some person whose estate he claims.

(i) The effect of the 2nd section of 3 & 4 Will. 4, c. 27, is to put an end to all questions and discussions whether the possession of the lands, &c., be adverse or not, and if one party has been in the actual possession for twenty years, whether adversely or not, the claimant whose original right of entry accrued above twenty years before bringing the ejectment, is barred by this section. (*Culley v. Doe d. Taylorson*, 3 P. & Dav. 548; 11 Ad. & Ell. 1008.) What is adverse possession has generally no operation except with regard to the 15th section, *Infra*, L. C., said, "Under the new act possession gives the right, and not only gives the right, but transfers the estate. All former statutes barred the remedy, but did not bar the estate; they did not create an estate, although they enabled the party to hold against all the world. But the new statute in point of fact gives the estate, to recover which the remedy is barred, for it bars the remedy and binds the estate; and if the five years have elapsed under the 15th section—if the possession was what was called adverse, because possession would give a good title under the act, unless the party could bring his case within some of the exceptions in the subsequent section—the estate is transferred, and the remedy is barred." (*Incorporated Society v. Richards*, 1 Connor & L. 84, 85.)

Cases on construction of second section of act.

Denman, C. J., said, "We are all clearly of opinion that the 2d and 3d sections of the stat. 3 & 4 Will. 4, c. 27, have done away with the doctrine of non-adverse possession; and except in cases falling within the 15th section of the act (see *post*), the question is, whether twenty years have elapsed since the right accrued, whatever be the nature of the possession." (*Nepean v. Doe d. Knight*, 2 Mees. & W. 911. See *Doe d. Higginbotham v. Barton*, 3 P. & Dav. 198.) In the former case the plaintiff claimed as grantee in reversion of a copyhold estate on the death of A., who went to America in the latter part of the year 1806, or early in 1807, and the last account that was heard of him was by a letter written by him from Charleston, which was received in May, 1807. The declaration in ejectment was served on the 18th January, 1830, and it was not shown that this was within twenty years after the death of A. As to the presumption of the death of a

party who has not been heard of for several years, see post, a. 16, note.

In 1788, estates were settled by marriage settlement to the use of the wife for life, with remainder to her issue in tail, with remainder to the settlor (whose heiress at law she was) in fee. In 1818, by deeds to which the husband and wife and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the wife for life, remainder to R. G. the son for life, remainder to his issue in tail, remainder to J. F. his sister for life, with other remainders over. The husband died in 1819, the wife in 1822, and R. G. in 1828, it was held, that, inasmuch as the estate of J. F. was carved out of the estate of R. G., she had the same period for bringing an ejectment in respect of any estates comprised in the above deeds, as he would have had if he had continued alive, viz., twenty years from the year 1822, when his remainder came into possession. The effect of the deed of 1818 and of the recovery was to bar all remainders over, and to create new estates out of his estate tail. (*Doe d. Curson v. Edmonds*, 6 Mee. & W. 296.)

By this act the right of entry is taken away, unless an entry be made within twenty years of the right first accruing where the party is not entitled to the benefit of the 16th section. In trespass *quare clausum fregit*. Declaration, Aug. 1838, laying trespasses in June 27th, 1838. Plea, That W. being seised in fee of the close before the time when, &c., to wit, June 23d, 1791, demised it to J. H. for 90 years, by virtue of which demise J. H. afterwards, to wit, on the same day, entered and was possessed: that after the demise and during the term, J. H. being so possessed, to wit, on November 21st, 1812, made his will, and thereby bequeathed the close to W. H. for all his the testator's estate therein; that afterwards, to wit, on January 17th, 1820, J. H. died so possessed of the said close for the remainder of the said term, after whose death, to wit, on 21st February, 1820, the executors assented to the bequest, whereby W. H. then became and was possessed for the remainder of the term; and he being so possessed, plaintiff, under colour of a pretended demise to him for his life by W. before the demise by W. to J. H. entered, to wit, on the day and year mentioned in the declaration, and was possessed; and thereupon defendant, at the time when, &c., as the servant of W. H., entered upon plaintiff, &c. Replication, That the trespasses were committed after 31st December, 1838, mentioned in stat. 3 & 4 Will. 4, c. 27, s. 2; that the entry was for the purpose of recovering the said close; that the supposed right of entry did not first accrue within twenty years next before such entry, and that by reason thereof the said right had become extinguished at the time when, &c. Rejoinder, That no acknowledgment of title had been given pursuant to stat. 3 & 4 Will. 4, c. 27, ss. 14, 15, before the

passing of the act; that W. H., at the time of the passing of the act, claimed to be and was entitled to the close as in the plea mentioned; that the close was not then possessed adversely to the right of W. H.; and that the entry was made, as in the plea mentioned, within five years next after the passing of the act. Surrejoinder, That the close, at the time of the passing of the act, was possessed, to wit, by one S., adversely to the alleged right of W. H. Issue thereon. It was held that the replication did not admit a possession in J. H. or W. H. within twenty years, and therefore was not inconsistent with itself; that before the statute, the surrejoinder would have been bad, as admitting a demise to J. H., and showing no subsequent title in the plaintiff, nor any other matter in bar of J. H.'s title. But that, since the statute, it being admitted by the rejoinder that W. H.'s right of entry did not accrue within twenty years, adverse possession by any person at the time of the act passing made W. H. a wrong doer if he afterwards entered, and mere possession by plaintiff at the time of the trespass was sufficient ground for this action. (*Holmes v. Newlands*, 11 Ad. & Ell. 44; 3 P. & Dav. 128.)

A. being tenant for life of a copyhold estate, and B. his daughter tenant in tail in remainder, joined in a recovery in 1778, and A. surrendered to the use of himself for life, remainder to the right heirs of the survivor. A. and B. shortly afterwards surrendered to a *bona fide* purchaser in fee. B. having become the survivor died without having made any further surrender. On an ejectment by her heir at law within twenty years after her death, it was held that the statute of limitations did not apply, inasmuch as B.'s life estate passed to the purchaser, B. therefore could not enter, and as the contingent remainder could not pass by the surrender, (*Doe v. Tomlins*, 11 East, 186; *Doe v. Wilson*, 4 B. & Ald. 303.) the heir at law had no right of entry until B.'s death. (*Doe d. Baverstock v. Relfe*, 3 Nev. & P. 648; 8 Ad. & Ell. 650.)

Where a lessor permits his lessee, during the continuance of the lease, to pay no rent for twenty years, the lessor is not therefore barred by the stat. 3 & 4 Will. 4, c. 27, s. 2, from recovering the premises in ejectment, but the case comes within the latter branch of the third section. (*Doe d. Davy v. Gougham*, 7 Mees. & W. 131. See post.)

The 2d section of the act taken in connection with the 12th, applies to coparceners, joint-tenants, and tenants in common, as to make their possession separate from the time when the act came into operation. (*Culley v. Doe d. Taylerson*, 3 P. & Dav. 560; 11 Ad. & Ell. 1008.)

A. was possessed of lands for more than twenty years, and died in 1817. His widow had possession from that time until her death in 1838. B. was the eldest son of A. and his wife. It was held, that although B. could not recover in ejectment as the heir of his father, because more than twenty years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived

An annuity
under a will
within the
act.

to her on the death of his father, and descended to B. as his heir, on her death in 1838. (*Doe d. Bennett v. Long*, 9 Carr. & P. 773.—*Coleridge*.)

Since this statute a distress or action for an annuity accruing by will, must be resorted to within twenty years from the death of the testator. It appeared that *John Salter*, the father of the defendant of that name, by his will duly made and published, devised the property therein mentioned to trustees, to the intent that they should, out of the rents and profits, pay to *John Salter*, the defendant, during the term of his natural life, an annuity or clear yearly rent of 30*l.*, by four quarterly payments, to commence on the first quarterly day of payment after his decease; with a power of distress, if the annuity should be in arrear for twenty days next after any quarterly day of payment. That the testator died in 1804, without having revoked or altered his will; and that, on the 17th March, 1835, the defendants distrained for 870*l.* for twenty-nine years arrears of the annuity, ending at Christmas, 1834. It appeared that the right to make a distress for the annuity first accrued to *John Salter*, the son, on the expiration of the 20 days next after the first quarterly payment subsequent to the testator's death, that is, at the very latest, some time in April, 1805. It also appeared that there was no payment or receipt of the annuity by the defendant *Salter* before the distress was put in in March, 1835, for it was for the whole of the arrears since the testator's death. The second issue on the case arose upon a plea in bar, framed upon the second section of stat. 3 & 4 Will. 4, c. 27. The facts brought the case within the second section, unless the third section did in terms exclude from the operation of the second the claim of any person whose right to a rent is derived under a will, by reason of the words "other than a will" in the third section. The court, in the first instance, expressed an opinion that the case was excluded from the operation of the second section, by reason of its not being comprehended within the third, which third section was thought to contain an enumeration of the instances to which only the second section could be held to be applicable; and the Court held that the annuitant was not barred by the lapse of twenty years, and the non-payment of the annuity. (*James v. Salter*, 2 Bing. N. C. 505.) Upon further consideration, the court changed their former opinion. *Tindal*, C. J., in giving judgment, said, "that the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and upon a more close examination of the third section, the object and intent of it seems to us to be no more than this: to explain and give a construction to the enactment contained in the second clause, as to "the time at which the right to make a distress for any rent shall be deemed to have first accrued," in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but is not in-

cluded amongst the instances given by the third, to be governed by the operation of the second. Many reasons concur to show that such must be the just construction of the act. In the first place, if it had been intended that the third section should limit the application of the second to those cases, and those only which are enumerated in the third, it might justly have been expected that words would have been employed to express clearly and distinctly such an intention. But in this section there are no words that can be said directly to exclude all instances, except those enumerated in the third section. Again, if the words "granted by any instrument other than by will," were to be held to prevent the application of the statutory limitation of twenty years to claims of land or rent granted by will, it would be at direct variance with other parts of the statute, for the instance in the third section immediately following that now under consideration, which provides for cases of claims in respect of estates in reversion or remainder, "or other future estates or interests," is large enough to comprehend, and would comprehend all executory devises; and again, section forty expressly provides for the case of any legacy. And indeed the words, "by any instrument other than by will," carry the matter no further than if the third section had proceeded by attempting to enumerate every species of instrument by which an estate in land or rent could have been granted, and had omitted to mention a will, in which case the only inference that could be drawn from such omission would have been, that the case, not being enumerated in the third section, fell back upon the general provision contained in the second. Indeed, unless this is held to be the true construction, the case which is likely to occur perhaps with the most frequency, viz. the devise of an estate in possession in land, or of an estate in possession in a rent charge first created by the will, would be altogether unprovided for by the statute. For the third class of instances enumerated in section three describes the grant to be "by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent," a description which can neither apply to the case of a devise of a particular estate in land, or of a newly created rent; for the deviser, who has by his will carved an estate in land out of the estate whereof he was seised, can never be said to have been possessed in respect of the same estate or interest as that claimed by the devisee; still less can the deviser, who creates a new rent-charge by his will, be said to have been in the receipt of his rent. The case therefore under discussion, not falling within the third section, but falling within the clear and unambiguous terms of the second, we hold to be governed thereby; that the claim and title of the defendant *Salter* to the annuity is barred by the lapse of twenty years since his right to distrain first accrued; and that the verdict upon the second issue must be entered for the plaintiff. (*James v. Salter*, 3

Bing. N. C. 544; see pp. 353, 355; 4 Scott, 168; 5 Dowl. P. C. 496.)

In *Paget v. Foley*, 2 Bing. N. R. 679; 3 Scott, 135; *Tindal*, C. J., said, "this statute was proposed to include other rents of the same nature as those to which the act, according to its title and preamble, was intended to apply, rather than to conventional rents reserved on a lease." It was not necessary, however, to decide the point in that case, for the reason which will hereafter appear. (See *post*.) The Real Property Commissioners seem also to have contemplated an assimilation of limitation for land and all rents, other than conventional rents between landlord and tenant. (See 1 Real Prop. Rep. p. 50.)

The word
"rent" does
not include
rents reserved
on leases.

The word "rent" in the 2nd section of the act does not include rents reserved on leases for years, but is confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rents service, fee farm rents, or the like. The author is indebted to the reporters for the judgment in the important case of *Grant v. Ellis* in the Exchequer, 9th November, 1841. The report of this case will appear in the 9th vol. of Messrs. Meeson and Welsby's Reports.

In an action of replevin for taking the goods of the plaintiff in his dwelling-house at K., it appeared by the pleadings, that in the year 1764, D. B., being seised in fee of the land on which the house in question was afterwards built, demised the same on a building lease for a term of ninety-nine years at an annual rent of 25*l.*, payable on the four usual days of payment, and it further appeared that on the 13th day of June, 1836, the reversion expectant on the determination of the term became, after various mesne assignments, vested in W. P. in fee. The defendant in replevin made cognizance as the bailiff of W. P., and justified the taking as a distress for three years and three quarters of a year's rent due at Lady-day, 1840, being the rent accrued due subsequently to the time when W. P. had acquired the reversion. To this cognizance the plaintiff pleaded in bar, that for a period of more than twenty years before any of the rent in question had become due, the parties entitled to the reversion, and through whom the said W. P. claimed, had discontinued the receipt of the rent reserved by the original lease, and that during that period no rent had been paid or received. To this plea there was a demurrer, and the question for the decision of the Court was, whether the plea in bar did or did not disclose a good defence to the claim of rent on the part of W. P. The question turned entirely on the construction of the stat. 3 & 4 Wm. 4, c. 27. By the 2nd section of that act it is enacted, "that no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action first accrued to the person through whom he claims." And by the 3rd section it is (amongst other things) enacted, "that when the person claiming such land

or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession *Grant v. Ellis.* or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which such profits or rent were or was so received." It is on these two enactments that the question mainly turned. On the part of the plaintiff it is contended, that his case comes expressly within the provisions of the act. W. P. he says derives title to the rent claimed through several persons named in the 2nd cognizance of the defendant, who were successively the owners in fee of the reversion expectant on the termination of the lease; and those persons being so entitled to the reversion discontinued the receipt of the rent for a period of more than twenty years next before the time when any of the rent distrained for became due, during which period no rent has been paid or received, and this the plaintiff contends is precisely within the letter and spirit of the statute. The defendant on the other hand contends, that this is not a case within the statute at all. He contends that the word "rent" in the 2nd section of the statute, cannot be taken as having any reference to rents such as that now in question, namely, rents reserved on leases for years by contract between the parties, as the conventional equivalent for the right of occupation, but must be confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rents service, fee farm rents, or the like. We accede to this latter view of the case. In order to come to a just conclusion as to the meaning of the word "rent" as used in the two sections to which we have referred, it is important first to consider what is the meaning of the word "recover" as used in the 2nd section. The enactment is, that no person shall make an entry or distress, or bring an action to "recover" any land or rent but within twenty years, &c. Now so far as relates to land, the word "recover" in this passage clearly means the same thing as "obtain possession or seisin of." The clause assumes one party to be in wrongful seisin or possession of land to which another has the right, and then limits the time within which the right must be asserted. If such be the meaning of the word "recover" when used with reference to one of its objects "land," it is very reasonable to suppose that the legislature intended it to have the same meaning in respect to the other object "rent." It is true indeed that with respect to an incorporeal hereditament, like rent, there cannot be strictly any wrongful adverse seisin or possession by another. If A. claims and receives the rent due to B., B. has still the same right against the tenant as if no payment had been made to A. The receipt of rent by A. is not inconsistent with a similar receipt by B., as

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the possession of land by A. is necessarily inconsistent with possession of the same land by B. But still before the passing of this act a party seised of rents, whether rents service, rents charge, or rents seck, might, in case the rent was paid to another or withheld from him, consider himself, if he thought fit, as being disseised of such rent. And a party electing to consider himself so disseised might have the same remedy by an assize to recover seisin of his rent, as a party disseised of land might have to recover seisin of his land. The judgment in each case was the same *quod recuperit seisinam*, and in each case the party was entitled to a writ of *habere facias seisinam*, which, in case of a recovery of rent, was executed by the sheriff delivering to the plaintiff an ox or other chattel on the land in lieu of execution, (Vin. Abr. Assize, B b. 12, Seisin, a. 7,) and in case of a subsequent withholding of rent, the party aggrieved might have his writ of redisseisin with all its consequences, as in the case of a subsequent disseisin of lands or houses. (Reg. Br. 206.) Now we are of opinion that it is to this sort of recovery only that the 2nd section of the statute has reference, for such is clearly the meaning of the word "recover" when used with reference to land, and the plain grammatical construction requires us to give it the same meaning when applied to rent, unless, which is not the case here, some manifest absurdity or inconvenience should result from our so doing. It follows from hence as a matter of course, that the word "rent" in the 2nd section must necessarily be confined to rent, which might in its nature have been the object of such a recovery, and this certainly does not include the rent reserved on common leases for years. According to our view of this case, therefore, even if the 2nd section had stood alone, we should have been of opinion that the pleas in bar afforded no answer to the defendant's cognizance, and consequently that he was entitled to judgment in his favor. But we think it right to add that the correctness of the construction we put on the 2nd section appears to us to be strongly confirmed by the subsequent parts of the statute. In the 3rd and some other sections, the act proceeds to define the time, in most though (as is noticed by Lord C. J. Tindal in the case of *James v. Salter*, 3 Bing. N. C. 553, *ante*, pp. 120, 121,) not in all possible cases, at which the right to make a distress for the purpose of recovering any rent shall be deemed to have first accrued to the party making the same. The first case put is that of a party, who has himself, in respect of the estate or interest claimed, been in possession of the rent, and who afterwards has been dispossessed or has discontinued the receipt of the rent. The estate or interest claimed must according to the context mean the estate or interest claimed in the rent, and not in the lands out of which the rent issues. Now a person entitled to the rent reserved on a common lease for years has no estate in the rent at all. (See *Prescott v. Boucher*, 3 B. & Ad. 849.) He is entitled to the rent, when it from time to time becomes due, as

being an incident to his reversion and not because he has any *Grant v. Ellis.* estate in the rent itself. He is himself the freeholder of the land and can therefore have no estate in rent issuing out of the land. The word "interest" indeed is of so large and comprehensive a nature as perhaps to embrace the right, which the reversioner has in the rent as incident to his reversion; still that interest can in no fair sense be described as the interest claimed. What is claimed by a landlord distraining for rent on a common lease for years is the amount of the arrears, wholly irrespective of the extent of his estate or interest in the reversion as an incident to which the right to those arrears has accrued. What he "recovers" by his distress is the amount due for arrears of rent, and will be the same whether he is tenant in fee simple, tenant for life, or tenant for years. The statute in this branch of section 3 clearly looks to the party recovering the same estate or interest of which he was previously possessed, and of which he had been dispossessed, and this is altogether inapplicable to a distress for rent incident to a reversion expectant on a common lease for years. Indeed this very distinction appears to have been contemplated by the legislature in this act, for by the 42nd section a limit is imposed as to the number of years' arrears for which a party entitled to rent may distrain, and there the subject-matter to be recovered by the distress is described not as "rent," but as "arrears of rent." It must further be observed in the present case, that at the end of the ninety-nine years, the reversioner will clearly be entitled to the possession of the land. For by one of the express provisions of section 3, the right to the reversion is to be deemed to have first accrued when the estate falls into possession, unless, which is not the case here, some third person shall in the mean time have got into wrongful receipt of the rents, this being in certain cases treated by the act as analogous to an actual disseisin. As therefore the rights of the reversioner, which are to be enforced when the particular estate is determined, are certainly preserved, it seems impossible to imagine that those rights which exist as incidents to the reversion during the subsistence of that particular estate could have been intended to be extinguished. The reason why, at the end of the ninety-nine years, the reversioner will be entitled to recover the land is, that during that term the party in possession has been holding under the lease in question, one of the terms of which is that he is to pay the rent reserved. The argument of the plaintiff goes to this, that though the tenant is most undoubtedly holding under the lease, yet that lease is to be treated as if all that concerns the reservation of rent were struck out, and all the other provisions remained. The landlord will be bound by his covenants for title (unless made conditional on payment of rent by the tenant), he will also be bound by his covenants, if such there are, to build or repair or furnish materials for building or repairing, and by all collateral engagements. The tenant, on the other hand, will be bound by his covenants as to cultivation, repairing.

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and the like, and this appears to us altogether inconsistent with the notion, that the legislator meant to bar the reversioner of his right to recover the rent when due. A strong argument in favour of the construction which we have put on this act may be drawn from the 9th section. It is there provided, that where a party is in possession of land under a lease on which a yearly rent exceeding twenty shillings is reserved, and the rent shall have been received by some person wrongfully claiming the reversion, and no payment of rent shall have been afterwards made to the person rightfully entitled, there the right to distrain for rent, or, after the termination of the term, to bring an action to recover the land, shall be deemed to have first accrued when the rent was first received by the wrongful claimant, and no such right shall be deemed to have first accrued on the determination of the term. It was strongly argued on the part of the defendant that this amounts to a virtual recognition by the legislature of the accuracy of the proposition for which he contends, namely, that where there is no receipt of rent by a party wrongfully claiming the reversion, there the right to the reversion and to the rent as incident to it, remains unaffected. We think there is great force in this argument, and its weight may be much increased by considering what, upon the plaintiff's construction of the statute, would be the position of the reversioner if no rent should be paid for twenty years, and after that time a wrongful claim should be set up by some party not entitled. Mere nonpayment of rent will certainly not bar the reversioner's right to recover the land at the end of the term. When therefore no rent has been paid for twenty years, the condition of the reversioner, according to the plaintiff's view of the law, is, that he has no possibility of obtaining payment of any further rent, but when the term is expired, he will be entitled to recover the land; suppose, then, that in this state of things a wrongful claimant should succeed in getting the tenant to pay rent to him, and that then, after twenty years, the term should expire, it is clear that by the express provision of the 9th section, the right of the reversioner to the land would be barred, so that by the act of a party wrongfully claiming rent to which he was not entitled, and which act the reversioner had, according to the plaintiff's argument, no possible means of contesting, the reversioner is at the end of the term deprived of what but for such wrongful act he would have been clearly entitled to, namely his right to the possession of the land. On the view which we take of the law, no such anomaly exists; for the reversioner, by distraining for or otherwise obtaining his rent, within twenty years after the first wrongful receipt of it by the adverse claimant, effectually prevents his being, by the wrongful act of another, deprived of the estate at the expiration of the term. It is not unworthy of notice, that throughout the act the receipt of rent is constantly mentioned in a mode which appears as if studiously designed to mark that the rent contemplated is not the ordinary rent reserved on leases for years,

not that which is usually spoken of as the rents and profits, *Grant v. Ellis*. but something distinct from both. For instance, in the 2nd section, the language is, *when the person claiming such land or rent shall have been in possession or in receipt of the profits of such land, or in receipt of such rent*; and the same, or nearly the same, mode of expression is used throughout the act. This is certainly not the ordinary mode of speaking of a person in actual possession of land, or in receipt of the rents reserved on leases for years. We do not rely very much on this argument, but the circumstance is worth adverting to. It was pressed on the part of the plaintiff that whatever question might have been raised as to the meaning of the word "rent," deducting that meaning from the 2nd and subsequent sections of the statute, yet that it was not competent to the court to give to the word any but its most extended meaning, by reason of the express enactment in the first section, the interpretation clause. But we do not feel pressed by that argument, inasmuch as that clause expressly excludes from its operation all cases in which the context requires a less extended signification. On the whole, therefore, we are of opinion that the limitation by the 2nd section of the statute does not apply to the present case, and consequently that there must be judgment for the defendant. (*Grant v. Ellis*, in *Exch.*, 9th Nov. 1841.)

It seems that the second section of 3 & 4 Wm. 4, c. 27, does not apply to claims for title composition, as between the title claimant and the owner of the land, but only to *estates in title*; but even if such a case did come within the 2nd section, it was within the saving of the 15th, as the withholding of title by the occupier of the land was not an adverse possession at the time of the passing of the 3 & 4 Wm. 4, c. 27. (*Lord Shannon v. Hodder*, 2 Brady, Adair & Moore, 223, n.)

By the common law there was no stated or fixed period within which it was necessary to commence actions, but afterwards certain remarkable events were from time to time selected for that purpose, as the return of King John from Ireland, and the coronation of Henry the Third. A certain period was limited by statute 32 Henry 8, c. 2, which enacted that no person should maintain any writ of right, or make any prescription, title or claim of, to, or for any *manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies or other hereditaments* of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but within sixty years next before the teste of the said writ, or next before the said prescription, title or claim so made. Actions upon the possession of the ancestor of the party claiming were limited to fifty years; and those upon the seisin or possession of the party himself to thirty years; and formedons in remainder or reverter were required to be sued within fifty years. The writ of intrusion came within the stat. 32 Hen. 8, c. 2, and not within the stat. 21 Jac. 1, c. 16, and the limitation of time for suing out such writ was fifty years. This writ was maintainable by one

Limitation of real actions before the new statute.

in remainder for an intrusion made after the determination of an estate *pur autre vie*; and a demandant who claimed under a devise might maintain the writ. (*Piercy, dem., Gardner, ten.*, 3 Bing. N. C. 748.) Dignities were held not to be within the statute of limitations, and even an adverse possession and exercise of a dignity by persons not entitled to it, for a period of eighty-five years, was resolved by the House of Lords not to bar the real claimant. (In the Barony of Willoughby of Parham, *Lords' Journ.* vol. 31, p. 350; see 3 Cru. Dig. 202.) But offices with fees and profits are within them. (*Lords' Journ.* vol. 36, p. 295.) An annuity was not within the stat. 32 Hen. 8, c. 2, for the plaintiff did not declare upon a seisin but upon his grant. (*Br. Sta. Limi.* 26; see *ante*, p. 120.) So that statute did not extend to a corporation aggregate, as mayor and commonalty, nor to a dean and chapter, as they did not count upon a seisin of any ancestor or predecessor, but upon their own possession. But it was otherwise as to a corporation sole; for if a bishop or other sole corporation sued upon a seisin of his predecessor, he was barred if the seisin was not within sixty years. (*Bro. Sta. Lim.* 33; *Bac. Abr. Limitations of Actions* (B).)

Non-claim on
fines.

By stat. 4 Hen. 7, c. 24, a fine with proclamations was made a bar to all persons having present rights of entry, and not being under any disabilities, if they did not claim within five years after the proclamations made; to all persons under disabilities, if they did not claim within five years after their disabilities were removed; and to all persons not having present rights, if they did not claim within five years after their rights of entry accrued, unless under disabilities, and then within five years after the removal of their disabilities. By the abolition of fines, the practice of gaining a title by a fine and non-claim will be prevented in future. (See 3 & 4 Will. 4, c. 74, s. 2, *post*.) In order that a fine should operate as a bar by non-claim, it was necessary that the person who levied it should have had a freehold either by right or by wrong. If he turned out a lawful possessor of it, if he had committed a disseisin, he had what was called a wrongful freehold, and if the party entitled had not claimed within five years after the fine had been levied, that would be a bar to him. Or if a person had been in by right adversely to the rest of the world, and asserting the dominion to be his own, and levied a fine after the proclamations had been made and five years had expired, any demand or latent claim would be equally barred. (*Davies v. Lowndes*, 5 Bing. N. C. 177, 178; *Runcorn v. Doe d. Cooper*, 5 B. & C. 701. See *Doe d. Burrell v. Perkins*, 3 Maule & S. 271; *Doe d. Parker v. Gregory*, 2 Ad. & Ell. 14.) If at the date of the fine the parties were all married women, the entry might be within five years after they became discovert, as regards them, or within five years of their death, if they died under coverture, as regards their heirs. (*Doe d. Blight v. Pett*, 11 Ad. & Ell. 853; 4 P. & Dav. 278.) A husband claiming in right of his wife, in order to avoid a fine must have entered

within five years after his title accrues. (*Doe d. Wright v. Plummer*, 3 B. & Ald. 474.)

The stat. 21 Jac. 1, c. 16, limited the period for all writs of *formedon* to twenty years, and enacted that no persons should at any time thereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his title should *first descend* or accrue to the same, and in default thereof, such persons so not entering, and their heirs, should be disabled from such entry after to be made.

The provisions of the statutes 32 Henry 8, c. 2, and the 21 Jac. 1, c. 16, were extended to Ireland by the Irish stat. 10 Car. 1, sess. 2, c. 6, by making the limitation in a writ of right on the seisin of the party's ancestors sixty years, and in a possessory action upon possession of ancestors fifty years, and in an action upon the party's own seisin or possession twenty years, and in an avowry or cognizance for rent, suit, or service, forty years. Actions of *formedon* and *scire facias* on fines and recoveries were limited to twenty years after the title or cause of action accrued, and an entry upon lands must be made within twenty years after the title accrued, with an exception in favour of persons being infants, *femes covert*s, non compos mentis, imprisoned, or beyond seas, who should sue within ten years after the removal of the disability.

By the stat. 21 Jac. 1, c. 16, s. 1, (10 Car. 1, sess. 2, c. 6, ss. 12; 13 Ir.) no entry could be made, and therefore no ejectment maintained, but within twenty years after the title of entry first accrued, with the exception of persons under disabilities. There were two periods from which the term of twenty years limited by that statute was to be computed, one with respect to the rights of persons entitled in possession, and the other with respect to the rights of persons entitled to future interests. Less difficulty arises with respect to the latter, because it can easily be proved when such rights would have come into possession by the determination of the preceding estates; but the former period is to be computed from the time when the *wrong-doer* acquired the possession of the freehold *adversely* to the title of the owner, whose estate thereby became a mere right; and in many cases it is very difficult to ascertain what will constitute such possession. It was formerly considered necessary that there should be an *ouster* of the seisin in one of five modes, called *disseisin*, *abatement*, *intrusion*, *discontinuance*, and *deforcement*. *Disseisin* is where the person in possession of the freehold is evicted. *Abatement* is where a wrong-doer enters on the vacant possession, after the death of the owner, instead of the heir or devisee. *Intrusion* is where a wrong-doer enters on the vacant possession, after the death of the tenant for life, instead of the remainder-man or reversioner. *Discontinuance* was where a tenant in tail in possession aliened by a tortious conveyance, as *feoffment* or *fine*, which did not bar the entail. *Deforcement* was considered to include the other four terms, and any hold-

Time of entry
under stat. 21
Jac. 1, c. 16.

ing over after the determination of an estate, or other wrongful withholding of the freehold from the right owner. (See 1 Real Prop. Rep. 494; 3 Bl. Comm. 167—173.)

Diseisin.

When a party enters by colour of a void grant, he is a *diseisor*. (*Buchler's case*, 2 Rep. 55 b; Cro. Eliz. 451; Cro. Car. 306, 388; Litt. Rep. 298, 373; Cro. Jac. 660; 1 Jones, 316.) But where a grant is according to the rules of law, but requires to be perfected by a subsequent ceremony, as if a feoffee enters before livery of seisin, he is not a diseisor. (2 Rep. 55.) Wherever there is a diseisin, the possession of the diseisor will be considered *adverse*, and the party must pursue his remedy within twenty years from the act constituting the diseisin. (Butl. Co. Litt. 330, b, n.) There may be an unlawful possession which does not amount to a diseisin. (*Doe v. Gregory*, 2 Ad. & Ell. 14; 4 Nev. & M. 308. See 2 Mees. & W. 904. As to diseisin, see *Taylor v. Horda*, 1 Barr. 108; *Doe v. Lynas*, 3 B. & C. 388; *Williams v. Hughes v. Thomas*, 12 East, 141; Roscoe on Real Actions, 61—63; 2 Prest. on Abst. 284, *et seq.*)

Adverse possession.

Great practical difficulty had arisen under the former statutes in determining what is adverse possession, and when it shall be considered to have begun. This must generally be left as a question of fact for the jury; but there are some rules of law (*presumptiones juris et de jure*), which absolutely prevented the possession from being considered adverse, and the expediency of which was very questionable, as they did not seem necessary for preserving rightful claims, and they greatly impaired the healing tendency of the statutes of limitations. (See 1 Real Prop. R. 47.) The above statute has for the most part put an end to questions of this kind, (see *ante*, s. 2, p. 117,) but still there will be cases arising under the 9th section, which must be decided with reference to some of the old rules as to adverse possession.

Where one person held an estate on the joint account of himself and another, or by the permission of the real owner, and without claiming any inconsistent right, the possession is not adverse, and the original title is not affected. Thus, where one holds lands as lessee, his possession is in contemplation of law that of the lessor. (1 Wils. 176, 3 Wils. 521.) For length of possession during a particular estate, as under a lease for lives, as long as the lives are in being, gives no title; but if the tenant hold over for twenty years after the death of *cestui que vie*, such holding over will in ejectment be a complete bar to the remainder-man or reversioner, because it was adverse to his title. (Cowp. 218.) Where the relation of landlord and tenant could be implied, the statute 21 Jac. 1, c. 16, did not run, (2 Bos. & Pull. 542;) or where the party in possession was tenant at sufferance. (2 Dowl. & Ryl. 38.) As to the effect of non-payment of rent since the stat. 3 & 4 Will. 4, c. 27, see *post*, pp. 139, 140.

Possession is either in fact or in contemplation of law, and in either case, while it remained in the owner, the stat. 21

Jac. 1, c. 16, did not run. Therefore, where a stranger entered and divided the profits of an estate for more than twenty years with the real owner, it was held that he might, notwithstanding, maintain an ejectment, as where two men are in possession, the law will adjudge it to be in him who has the right. (*Leeding v. Rawstorne*, 2 Ld. Raym. 829; 1 Salk. 423.)

Issues in tail had no distinct and successive rights under the stat. 21 Jac. 1, c. 16, any more than heirs of estates in fee simple, (4 Taunt. 830;) and therefore that statute began to run when the title descended to the first tenant in tail, unless he was under a disability, and each succeeding tenant in tail had no right to sue within twenty years after the death of his predecessor. (*Tolson v. Kaye*, 3 Brod. & Bing. 217. See 3 B. & Ad. 738.)

Where the possession of one party was consistent with that of the other, it was not considered adverse. Thus, where by a marriage settlement a copyhold estate of the wife was limited to the use of the survivor in fee, but no surrender was made to the use of the settlement, and after the death of the wife, the husband was admitted to the lands, pursuant to the equitable title acquired by the settlement, it was held that if he had had no other title than the admission, a possession by him for twenty years would have barred the heir of the wife; but as it appeared that there was a custom in the manor for the husband to hold the lands for his life in the nature of a tenant by the curtesy, and this without any admittance after the death of the wife, the possession of the copyhold by the husband was referred to this title, and not to the admission under the settlement; and such possession being consistent with the title of the heir at law, he was allowed to maintain ejectment against the devisee of the husband within twenty years after the husband's death, though more than twenty years after the death of the wife. (*Doe d. Milner v. Brightwen*, 10 East, 588.) So where A. being seised in fee of an undivided moiety of an estate, devised the same (by will made some years before her death) to her nephew and two nieces as tenants in common; one of the nieces died in the lifetime of A., leaving an infant daughter. A., by another will, which was never executed, intended to have devised the moiety to the nephew and surviving niece, and the infant daughter of the deceased niece. After A.'s death, the nephew and surviving niece covenanted to carry the unexecuted will into execution, and to convey one-third of the moiety to a trustee upon trust to convey the same to the infant if she attained twenty-one, or to her issue if she died under twenty-one and left issue, or otherwise to the nephew and niece in equal moieties. No conveyance was executed in pursuance of the deed. The rents of the third were received by the trustee for the use of the infant during her lifetime. An ejectment having been brought by the devisee of the nephew more than twenty years after his death, but within twenty years after the death of the infant, it was held, that there was no adverse possession until the death of the infant, and that the ejectment

was well brought. (*Doe d. Colclough v. Hulst*, 3 B. & Cr. 757.) But where copyhold lands had been granted to A. for the lives of herself and B., and in reversion to C. for other lives, and A. died, having devised to B., who entered and kept possession for more than twenty years; it was held that C. was barred by the statute after B.'s death from maintaining ejectment, as C.'s right of possession accrued on the death of A., when his interest terminated, inasmuch as there could be no general occupant of copyhold land. (*Doe d. Foster v. Scott*, 4 B. & Cr. 706; 8 C. 7 Dowl. & Ry. 190.) A wrongful continuation of possession for twenty years after the expiration of a title, under which the tenant lawfully entered, constituted such an adverse possession as would, under the statute of 21 Jac. 1, c. 16, create a bar to an entry or to an action of ejectment, as where husband of tenant for life held over twenty years after her decease. (*Doe d. Parker v. Gregory*, 4 Nev. & Mann. 308. See *Doe d. Allen v. Blakeway*, 5 Carr. & P. 563.)

In order to prove possession, in an ejectment for mines, it is not sufficient to show that the lessor of the plaintiff was lord of the manor, an actual possession must be proved. (*Lord Cullen v. Rich*, Runn. 292; *Rich v. Johnson*, Str. 1142.) Nor will a verdict for the plaintiff in trover for lead dug out of a mine, prove possession of the mine, for the action may have been brought by the heir at law, who had property in the mine but had no possession. (Runn. 292.)

Encroach-
ments from
waste.

The stat. 21 Jac. 1, c. 16, ran against the lord of a manor as well as against any other person. (*Gresby v. Preston*, Selw. N. P. 702.) Hence, if a house, &c., be built upon the waste, the lord shall take care to have some entry made of it in his books, and reserve some rent or service, otherwise he will lose his right. (*Id.*) If a cottage is built upon waste in defiance of a lord of a manor, and quiet possession has been had of it for twenty years, it is within the stat. 21 Jac. 1, c. 16; but if it were built at first by the lord's permission, or any acknowledgment have been since made, (though it were 100 years since,) that statute would not run against the lord. (*Bull. N. P. 104*, cited 3 B. & C. 414.) Payment of rent for a piece of waste land after an occupation of thirty years without previously paying any rent, was held conclusive evidence that the former occupation by the party was a permissive occupation. (*Doe d. Jackson v. Wilkinson*, 3 B. & C. 413.) So where a cottage, standing in the corner of a meadow, (belonging to the lord of a manor,) but separated from the meadow and highway by a hedge, had been occupied for about twenty years without any payment of rent, and then upon possession being demanded by the lord was reluctantly given up, and was afterwards restored to the party, he being at the time told that if allowed to resume possession, it would only be during pleasure, and he kept possession fifteen years more, and never paid any rent; it was held that the jury were warranted in presuming that the possession had commenced by the permission of the lord. (*Doe d. Thompson v. Clarke*, 8 B. & C. 717.) Where A., in 1800,

without any leave, inclosed a small piece of waste land from a common, and held and cultivated it, and in 1826 built a hut upon it, wherein he lived for a year and a half, and in 1827 sold and conveyed it to a purchaser. In the years 1806, 1811, and 1817, the parish officers and freeholders, who perambulated the parish, for the purpose of marking the boundaries and asserting their right of common, pulled up a portion of the fence to the land inclosed, and dug up part of the bank and rede through the inclosure. In 1820 or 1822, a like perambulation was made by the direction of the lord of the manor, when similar acts were done. No acknowledgment was paid to the lord for the land, nor other act done for asserting the right to the land. In a question as to the settlement of A., it was held that he had been in adverse possession of the land for twenty years. (*Rex v. Inhabitants of Woburn*, 10 B. & C. 846.) An inclosure made from the waste twelve or thirteen years before, and seen by the steward of the same lord from time to time without objection made, may be presumed by the jury to have been made by license of the lord; and ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up. (*Doe d. Foley v. Wilson*, 11 East, 56.) If a license be given by a commoner, by parol, to build a cottage on a common, he cannot maintain an action for the encroachment, although no sufficient common is left. (*Harvey v. Reynolds*, 12 Price, 724; 1 C. & P. 141.) To trespass on the case by a freeholder having right of common against a defendant for an encroachment, a plea of leave and license was held to be supported by evidence that the plaintiff had permitted a former encroachment by the defendant, the plaintiff being then under age, and had since, when of full age, countenanced a further encroachment by expressing his assent, and requiring an increase of the rent or annual acknowledgment paid by the defendant. (*Id.*) If a person, within twenty years, inclose a portion of the lord's waste by the license of the lord, such person cannot be turned out of the possession of it by the lord, without some act being done, from which a legal revocation of the license can be inferred. (*Doe d. Dunraven v. Williams*, 7 Car. & P. 332.) When premises have been inclosed from the waste with the knowledge of the lord, the license presumed from his acquiescence may be revoked by the lord's breaking down the fences before the commencement of the action. A cottage had been built on land inclosed from the waste, and there was evidence of its having been done with the knowledge of the lord. It was proved, that the lord of the manor and his servants, a few days only before the action was brought, had entered on the inclosure and broken down the hedges in several places: it was held, that the jury were warranted by such act in finding a revocation of the license. Such revocation may be by act in pais or by parol; and no precise time is limited by law as necessary to intervene between it and the commencement of the action, which treats the party in possession as a trespasser. (*Doe d. Beck v. Heakin*, 6 Ad.

Encroach-
ment by te-
nant adjoining
landlord's
estate.

Right con-
ferred by
twenty years'
possession.

& Ell. 496; 2 Nev. & P. 660.) A., forty-five years ago, inclosed a piece of ground from the waste, and built a cottage on it; he died twenty-nine years ago, and after that his widow and daughter lived on the premises till the death of the former, a month before the trial: it was held, in ejectment by A.'s eldest son, that his claim was barred unless the jury were satisfied that his mother held the premises by his permission and not adversely. (*Doe d. Pritchard v. Jauncey*, 8 Car. & P. 99.) If a person makes an encroachment from the waste, and dies within twenty years, this encroachment (except as against the rightful owner) descends to his heir, and does not go to his executor. (*Id.*) If a tenant makes an encroachment adjoining to the farm he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly, from some act done at the time, that the tenant intended to make the encroachment for his own benefit, and not to hold it as he held the farm. (*Doe d. Lewis v. Rees*, 6 Car. & P. 610; *Doe d. Challenor v. Davies*, 1 Esp. 461; *Bryan d. Child v. Winwood*, 1 Taunt. 208; *Doe d. Watt v. Morris*, 2 Bing. N. C. 189; 2 Scott, 276.) That encroachments by the tenant on the waste do not belong to the landlord, see *Doe d. Colclough v. Mulliner*, 1 Esp. 460. *Prima facie*, every inclosure made by a tenant adjoining the demised premises is presumed to be made by him for the benefit of the landlord; but this presumption may be rebutted by evidence. If a lessee inclose land which is near the demised premises, as being part of the premises comprised in his lease, this is not an adverse possession against his landlord, and a twenty years' possession by him will not enable him to retain possession of the inclosed land against his landlord. (*Doe d. Dunraven v. Williams*, 7 Car. & P. 332; *Doe d. Harrison v. Murrell*, 8 Car. & P. 134.) Possession for twenty years, though gained by manifest wrong, and though liable to be defeated by the entry of the rightful owner, is a title as against strangers. (*Doe d. Payne v. Webber*, 1 Ad. & Ell. 119; 3 Nev. & M. 746; *Doe v. Parke*, 4 Ad. & Ell. 816,) and consequently confers on the possessor, on ouster or trespass by a stranger, the ordinary remedies for such injuries, notwithstanding it may be apparent to the court that the rightful title is in another. (See 3 Mann. & R. 112, n.) A party who has a possession for twenty years has a good title against any one coming in after, unless the latter shows title. (*Doe d. Danson v. Parke*, 4 Ad. & Ell. 818; per Lord Denman. See *Doe d. Smith v. Webber*, 1 Ad. & Ell. 119.) Before the stat. 3 & 4 Will. 4, c. 27, if no other title appeared, a clear possession of twenty years was strong presumptive evidence of a fee. (*Doe d. Barswell v. Barnard*, Cowp. 595.) Possession of land for any term less than twenty years by a feoffee is not presumptive evidence of livery of seisin. (*Doe d. Wilkins v. Cleveland*, 9 B. & C. 864; S. C. 4 M. & R. 666; *Doe d. Lewis v. Davies*, 2 Mees. & W. 503.)

An adverse possession of twenty years is not only a negative

her to the plaintiff's recovery in ejectment, but takes away his right of possession and gives a positive title to the opposite party. (Runn. Eject. 55, 2 ed. ;) therefore where a plaintiff in ejectment proved twenty years' possession immediately preceding that for ten years by the defendant, it was held that the former was entitled to recover, as his earlier possession must prevail. (*Doe d. Harding v. Cooke*, 7 Bing. 346; 8 C. 3 Moore & P. 181. See also *Storke v. Berry*, 1 Ld. Raym. 741; 2 Salk. 421; 1 Burr. 119.) Where a party is let into possession of land with the consent of the owner, and does acts importing that he continued in possession only with the owner's permission, such acts will prevent the possession being adverse. (See *Litt. s. 70*.) On ejectment, G., under whom the defendant claimed, was let into possession twenty-two years before the action brought, by virtue of a contract with P. for the purchase of an allotment accruing to P. under an inclosure act, which provided that a purchaser let into possession of an allotment should have the same rights as the vendor. G. paid interest on a portion of the purchase money for some years, but never completed the purchase: it was held that even after the lapse of twenty-two years, his possession was not adverse to P.'s title, and that there was no ground to presume a conveyance. It was also held that G., or any person claiming under him, was estopped from raising an objection to P.'s title, that the commissioners of inclosure had made no formal award. (*Doe d. Milburn v. Edgar*, 2 Bing. N. S. 498.) Where a widow continued to reside in a freehold house, of which she was seised, for more than twenty years after her husband's death, it was held that her possession was not adverse, except perhaps against the heir, as her possession might be intended to be in respect of dower. (*Doe d. Hickman v. Haslewood*, 1 Nev. & P. 352; 6 Ad. & El. 167.) As to parol declarations negating a widow's title under a possession for twenty years, see *Doe d. Haman v. Pettit*, 6 B. & Ald. 223; *Doe d. Jeffrey v. Harbrough*, 1 Nev. & M. 422; 3 Ad. & Ell. 67. The solitary act of entry and attornment, followed by no assertion of right for upwards of thirty years, is no evidence of a possession not being adverse prior to 3 & 4 Wm. 4, c. 27. E. being in occupation of land, signed an instrument, whereby he recited that he was tenant of the land; that L. claimed the fee, and had entered in the name of taking possession; that E. did thereby attorn to L., and become tenant to him from the preceding Michaelmas for such part as was in his occupation, at the rent under which E. now occupied, and that he had that day paid L. a shilling in part of his rent: it was held, that this was an attornment, but not an agreement requiring a stamp, though no title was showed *aliunde* in L.; and that it was evidence of L.'s ownership at the time of the attornment, against future occupiers, though such occupiers did not claim through E. The land was copyhold. After the attornment L. was not admitted, nor did he receive rent, or occupy, or in any way interfere with the land, the fee in which was several times

sold, with proper formalities in the copyhold court, within the twenty years following: it was held, that L. (before the stat. 3 & 4 Will. 4, c. 27,) was absolutely barred from bringing ejectment at the end of the twenty years, though E. continued in occupation till within twenty years of the ejectment brought. The action was commenced before the 31st December, 1833, therefore the stat. 3 & 4 Will. 4, c. 27, did not apply, and it was unnecessary to consider the point that would have arisen under the 2, 8 and 15 sections. (*Doe d. Linsey v. Edwards*, 5 Ad. & El. 95.) The owner of a cottage divided into two parts, in 1808 put in two servants, H. and W. to occupy it, who occupied each part severally till his death in 1814, without paying rent. They continued to occupy undisturbed after his death till 1821, when H. died, having by his will devised his moiety to W. H. some time before his death took in L. to live with him as a servant, and after H.'s death, L. continued in possession. It was held, on ejectment brought by W., that by proving L. to have come in under H. he had shown a *prima facie* title. The stat. 3 & 4 Will. 4, c. 27, s. 2, was held inapplicable, because the defendants were mere strangers, and the question was whether the plaintiff had made out any title at all, and the court thought that he had, by showing H. to have been in possession of the premises, and that L. came in under H. (*Doe d. Willis v. Birchmore*, 1 Perry & Dav. 448; 9 Ad. & Ell. 662.) A woman living apart from her husband, obtained a demise of property for a term, the husband's representative brought ejectment against a party who claimed to have had adverse possession for more than twenty years, and who had obtained and held possession without knowing of the husband's existence: it was held, that it was no misdirection to direct the jury to find for the plaintiff, unless they thought that such possession was adverse to the wife; inasmuch as, if adverse to the wife, it was adverse to the husband, and not otherwise. (*Roe d. Wilkins v. Wilkins*, 4 Ad. & El. 86; 5 Nev. & M. 434.)

Right of claimant to take possession.

It should seem that every claimant who has such a right of possession as would entitle him to maintain ejectment, is still competent to take possession, of his own authority, if he can do so without committing a breach of the peace. (*Taylor v. Cole*, 3 T. R. 292; *Taunton v. Costar*, 7 T. R. 431; *Ree v. Wilson*, 8 T. R. 357; *Rogers v. Pitcher*, 6 Taunt. 202; 1 Marshall, 541; *Turner v. Meymott*, 1 Bing. 158; 7 Moore, 574; Co. Litt. 245, b; 1 Mann. & Ry. 221, n. (c); 5 Nev. & M. 164; *Reg. v. Newlands*, 4 Jurist, 322.) After a tenancy has been determined by a notice to quit, the landlord cannot enter on the premises whilst the tenant still remains in possession, and after requesting him to depart and give up the possession, and his refusing so to do, turn him out of possession by force, using as much force and no more than is necessary, for that purpose. (*Newton v. Hurland*, 1 Mann. & G. 644; see *Taylor v. Cole*, 3 T. R. 295; *Taunton v. Costar*, 7 T. R. 431; *Hey v. Moorhouse*, 6 Bing. N. C. 52; 8 Scott,

156; *Butcher v. Butcher*, 7 B. & C. 402; 1 M. & Rob. 220; *Turner v. Maymott*, 1 Bing. 158; 7 Moore, 574.)

It has been justly remarked, that an adverse possession will be negatived in the following cases: 1st, when the parties claim under the same title; 2ndly, when the possession of one party is consistent with the title of the other; 3dly, when the party claiming title has never in contemplation of law been out of possession; 4thly, when the possessor has acknowledged title in the claimant. (Ad. Eject. 47, 2nd ed.)

WHEN RIGHT SHALL BE DEEMED TO HAVE FIRST
ACCRUED.

III. And be it further enacted, that in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land (*h*), or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received (*l*); and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) (*m*) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in

When the right shall be deemed to have accrued;

in the case of an estate in possession;

on dispossession;

on abatement or death;

on alienation;

the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person, claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument (n); and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest (o), and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession (p); and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken.

in case of future estates;

in case of forfeiture or breach of condition.

(k) By section 35, the receipt of the rent payable by any tenant from year to year, or other lessee, is against such lessee or any person claiming under him (but subject to the lease), the receipt of the profits of the land for the purposes of this act.

(l) See *Grant v. Ellis*, ante, pp. 122—127.

(m) On the construction of these words "other than a will," see *James v. Salter*, 3 Bing. N. C. 544; 4 Scott, 168; ante, pp. 120, 121.

(n) It was doubted whether the third section comprehended the case of a mortgagee, so as to render it necessary for him to bring his action of ejectment within twenty years from the day of default made in payment of the mortgage money. (*Doe v. Williams*, 5 Ad. & Ell. 291.) But it is now provided by stat. 7 Wm. 4 and 1 Vict. c. 28, that a mortgagee of land, as defined by stat. 3 & 4 Wm. 4, c. 27, s. 1, (ante, p. 104,) may bring actions to recover land within twenty years after the last payment of any principal or interest. (See *Doe d. Roylance v. Lightfoot*, 8 Mees. & W. 563; section 28, post, and note.)

(o) The words "or other future estate or interest," were said to be large enough to comprehend, and would comprehend, all executory devises. (*James v. Salter*, 3 Bing. N. C. 554, ante, p. 121.)

Effect of

(p) Where a landlord merely omits to compel his lessee,

during the continuance of a lease, to pay rent for twenty years, ^{non-payment of rent.} and there has been no payment to any other person, the landlord is not therefore barred, but may recover in ejectment, at any time within twenty years after the determination of the lease, such a case being within the latter part of this section. In an action of ejectment, it appeared that R. B., being seized in fee of the premises in question, in the year 1795 devised them to T. D. and A. D. for 99 years, if three persons named in the lease, or the survivors or survivor of them, should so long live, reserving an annual rent of 38*l*. In 1815, J. D. acquired the fee in the premises; and on his death they descended to his heir at law, G. D., who, in 1825, devised them to E. D., the lessor of the plaintiff in fee. In the year 1802, A. D., the surviving lessee under the lease of 1795, assigned the premises to the defendant, who paid the rent until 1815, when he entered into an agreement with J. D., that on D.'s being allowed to make certain alterations in the premises, he should not call on the defendant for payment of any further rent during his life. The defendant accordingly occupied the premises without payment of any rent until the determination of the lease by the death of the last *cestui que vis* in 1837, when the action was thereupon commenced, the defendant having refused to give up the possession. It was contended for the defendant, that the right of the lessor of the plaintiff was barred by the stat. 3 & 4 Will. 4, c. 27, more than twenty years having elapsed since 1815, at which time the right of action, by reason of the non-payment of the rent, first accrued. The learned judge overruled the objection, and a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a verdict, if the court should be of opinion that the statute was a bar. Upon this motion, *Parke*, B. said, "I think there is no ground whatever for granting a rule in this case. The point appears to me to be perfectly clear, and I cannot see how any doubt could have been entertained on the subject. The lessor of the plaintiff claims an estate in remainder, expectant on the determination of a lease granted for ninety-nine years, if three persons named in the lease should so long live. She has but the right of possession until the end of that period, or the expiration of the last of the three lives. The case therefore falls within the latter part of the third section of the act. The ninth section throws light on this subject. Here there has been no adverse claim, and no payment of rent to any other person; it is the mere case of a landlord omitting to compel his tenant to pay the rent reserved by his lease. The right of the plaintiff manifestly accrued on the determination of the lease, and he is entitled to bring his action at any time within twenty years from that period. (*Doe d. Davy v. Osnamham*, 7 Mee. & W. 131, 133, 134; see *Grant v. Ellis*, *ante*, pp. 122—127.) The former case was followed where the lessor of the plaintiff in ejectment had purchased the reversion, subject to a lease for years, at a rent of 4*l*. and to an annuity of 4*l*., and the tenant in possession under the lease

had paid the sum of 4l. yearly for upwards of twenty years to the annuitant until his death in 1830, and subsequently to his widow : it was held, that it was for the jury to consider in what character the tenant made such annual payment, and if, as agent for his landlord, the possession was not adverse, and the right of the person entitled to the reversion is not barred by the 3 & 4 Will. 4, c. 27. (*Doe d. Newman v. Gonsill*; 5 Jur. 170, Q. B.) In a recent case in Ireland of a lease for lives at a rent above 20s. with the common condition of re-entry, it was held that the landlord could not maintain ejectment for non-payment of rent after the tenant had been more than twenty years in possession without paying rent to the landlord or any other person, a right of entry having accrued more than twenty years before. The case of *Doe d. Davy v. Orenham*, (*ante*, p. 139) was cited, and the court was strongly pressed with the anomaly of the landlord being entitled to recover the possession at the end of the term, or within twenty years after, and yet be unable to avail himself of the condition of re-entry in the subsisting lease. The Court of Common Pleas, however, after considerable deliberation, while they recognized the propriety of the above decision of the English Exchequer, and admitted the existence of the anomaly, yet stated they felt bound by the language of the enactments, which they thought clear on the subject. (*Leases Mannion v. Bingham*, Trin. 1841, C. B. Ireland; Smythe's Law of Landlord and Tenant in Ireland, 676.)

Where property is under lease, adverse possession runs against the reversioner from the expiration of the lease, or from the time when the tenant pays rent to one claiming wrongfully to be entitled in immediate reversion. A bill of discovery in aid of an action of ejectment, filed in 1840, stated that in 1776, A. B. being seised in fee, granted leases of the property which expired in 1825, and that the plaintiff, as heir of A. B., was now entitled to the property, for the recovery of which he was about to bring an action of ejectment. The defendant pleaded the statute of limitations, (3 & 4 Will. 4, c. 27,) and averred that the plaintiff had not been in possession or received rents for more than twenty years before the bill was filed; that the defendant had entered into possession as purchaser in fee simple in 1819, and had ever since remained in peaceable possession as tenant in fee: it was held, that this plea could not in law be sustained, for there being no allegation that the rent had been paid to any one wrongfully claiming to be entitled in reversion immediately expectant on the determination of the lease, the plaintiff's right did not accrue until the expiration of the lease in 1825, or within twenty years from the filing of the bill. (*Chadwick v. Broadwood*, 3 Beavan, 308.)

When the rents of mines are reserved by means of payment of produce in specie, the profits will be considered as accruing to the lessor at the time of receiving such produce, and not at the time of the sale of it, and therefore the statute will run from the time of such receipt, and not from the time of such sale. (*Denys v. Shuckburgh*, 4 Y. & Coll. 42.)

Forfeiture.

IV. Provided always, that when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest, in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened. (r)

Where advantage of forfeiture is not taken by remainder-man, he shall have a new right when his estate comes into possession.

(r) Though a remainder-man, expectant on an estate for life or years, to whom a right to enter, or bring an ejectment, is given by the forfeiture of the tenant for life or years, may take immediate advantage of a forfeiture, yet he is not bound to do so; therefore, if he pursues his remedy within his time after the remainder attached, it will be sufficient, nor can the statute of limitations be insisted on against him, for not coming within twenty years after his title first accrued by the forfeiture. (1 Ves. sen. 278. See *Doe d. Allen v. Blakeway*, 5 Carr. & P. 563.) So where a testator, having made a lease for years of an estate, with a clause of re-entry on non-payment of rent, devised it, and after his death his heir received the rent during the lease (being a period of more than twenty years,) without any steps having been taken by the devisee to recover the possession; it was held that the devisee was not barred, for he could not have entered during the lease; and although a forfeiture had been committed, he was not obliged to take advantage of it. (*Doe d. Cook v. Danvers*, 7 East, 299.) So also strangers to fines, having different and distinct rights by several titles accruing at different times, were allowed five years to avoid a fine after the accruing of each title; (*Cruise Dig. tit. XXIV. ss. 29, 34.* See 1 Wms. Saund. 319, a. n.;) it was determined, that where a fine was levied by a tenant for years, advantage must be taken by the person who is reversioner at the time the fine was levied, and that he could not assign his right of entry, nor enter himself after having parted with his reversion. (*Fenn v. Smart*, 12 East, 444.)

The lord of a manor is barred by the statute of limitations from entering for a forfeiture after twenty years. (*Whitton v. Parnock*, 3 M. & Keen, 325.) If a copyholder made a lease of his copyholds contrary to the custom of the manor, and the lord died before his entry or seizure for the forfeiture, the rever-

sioner or remainder-man could never take advantage of the forfeiture done or committed before their time; (*Lady Montagu's case*, Cro. Jac. 301; Co. Cop. s. 60; *Doe dem. Tarrant v. Hallier*, 3 Term Rep. 162,) unless the act of forfeiture destroys the estate, (3 Term Rep. 173.) As to forfeiture for a lease not warranted by the custom of the manor, see *Chamberlain v. Drake*, 2 Sid. 8; and for waste, *Eastcourt v. Weeks*, Salk. 186; Lutw. 799; *Bird v. Kirkby*, 1 Mod. 199; Carter, 237; Gilb. Ten. 249. But the lord may seize copyhold land *quousque* in virtue of a right which accrued to the preceding lord on default of the heirs coming in to be admitted, although he be devisee, and not the heir of the preceding lord; but, to entitle him to make such seizure, there must be three proclamations made at three consecutive courts. (*Doe d. Bover v. Trueman*, 1 B. & Ad. 736.) The admittance of a copyholder, after a forfeiture incurred by levying a fine, would be a waiver, and any act equally solemn will have the same effect. (3 Term Rep. 172.) M., after a devise of his property real and personal to P., purchased lands in fee, and procured an assignment of an outstanding term of years to P. as his trustee. On the death of M., without republishing his will, a moiety of the fee descended to P.'s wife as coparcener with others; but P., thinking himself entitled under the will, entered into and took the profits of the whole to his own use, and afterwards joined his wife in a feoffment and fine *sur cognisance de droit come ceo*, with proclamations: it was held, that the term was not merged by the seisin of P. in right of his wife; that the feoffment and fine were not void, but operated as a disseisin and forfeiture of the term, of which advantage might be taken by entry within five years either after forfeiture or after the expiration of the term; that in the mean time, the term might be treated as still subsisting, for the purposes of entitling a plaintiff in ejectment to recover on a demise of P.'s personal representatives. (*Doe d. Blight v. Pett*, 11 Ad. & Ell. 842; 4 P. & Dav. 278.)

In cases of conditions of re-entry, there is a difference between leases for *lives* and leases for years, and, with respect to the latter, there is also a difference between them, which arises entirely from the manner in which the condition of re-entry is expressed in the lease. As to leases for lives, it is held that, if the tenant neglects or refuses to pay his rent after a regular demand, or is guilty of any other breach of the condition of re-entry, the lease is only *voidable*, and therefore not determined until the lessor re-enters, that is, brings an ejectment for the forfeiture; though the clause of the condition should be, that for the non-payment of rent or the like, the lease *shall cease and be void*. For it is a rule, that where an estate commences *by livery* it cannot be determined *before entry*. (Plowd. 135, 136.) And in the case of a freehold lease, entry is requisite before bringing an ejectment for a forfeiture. (Co. Litt. 218; 2 Rep. 53, a; 4 Tyrw. 625.)

As actual entry is not necessary to avoid a mere license to enter, but by analogy to what is required to be done in order to determine a freehold lease, which, by the terms of it, is to be void on the non-performance of covenants, it seems to follow, that to put an end to such a license, the grantor must give notice of his intention to do so after a breach of a condition, which notice would be equivalent to an entry or claim by the grantor of a freehold estate to which a condition is annexed. (*Roberts v. Davey*, 4 B. & Ad. 664.) If the lessor, after notice of the forfeiture, which is a material and issuable fact, (3 Rep. 64 b., 2 T. R. 430, 431,) accepts rent which accrued due after, or does any other act which amounts to a dispensation of the forfeiture, the lease, which was before voidable, is thereby affirmed. But the dispensation with a forfeiture for a breach of a condition does not take away the right of entry for a subsequent breach. (*Ros v. Harrison*, 2 T. R. 425; *Macher v. Foundling Hospital*, 1 Ves. & B. 191; *Doe v. Mier*, 4 Taunt. 725.) With respect to leases for years, the necessity of an entry depends upon the wording of the condition. If the words be, that upon the doing of such an act the reversioner may enter, there must be an entry to avoid the estate; but if the estate be granted upon condition that if the tenant do such an act the estate shall thereupon immediately come and determine, there no entry is necessary. (12 East, 464.) In the first case the lease is only voidable, and may be affirmed by the acceptance of rent, or other act, if the lessor had notice of the breach of the condition at the time. (Plowd. 302; Co. Litt. 215, a; 3 Rep. 64, a, 65; Cowp. 804.) A disclaimer made by a landlord on the assignee of his lessee is a waiver of a forfeiture incurred by a prior breach of covenant; but if there be a continuing breach, the landlord is not precluded from taking advantage of it for a time subsequent to the disclaimer. (*Doe d. Flower v. Peck*, 1 Barn. & Ad. 428.) But where a lease for years is made with a condition that for non-payment of the rent, or the like, the lease shall be null and void, if the lessor makes a legal demand of the rent, and the lessee neglects or refuses to pay, or is guilty of any other breach of the condition of re-entry, the lease is absolutely determined, and cannot be set up again by acceptance of rent due after the breach of the condition, or by any other act. (Cowp. 804. See 1 Wms. Saund. 287, c. n. 16.)

It was held, that a condition of re-entry on breach of covenants in a lease could only operate during the continuance of the lease; when that was determined, the proviso was gone, and the reversioner, having never been in possession by right of re-entry for the condition broken, could not take advantage of it, and that the lessee, who had sown the land, was entitled to continuance. (*Johns v. Whitley and others*, 3 Wils. 127—10.)

A lessor has a right to make the estate of his lessee conditional, and the assignee of such an estate takes it subject to the condition, and liable to be divested by the breach of it. It is immaterial in a case in which the lessor, and not the assignee

Entry when necessary.

of the reversion, is the real plaintiff, whether the condition is for the performance of some covenant which runs with the land, or one which is wholly collateral; upon the breach of either species of covenant, the estate ceases when the lessor chooses to take advantage of his right of re-entry. (*Doe d. Flower v. Peck*, 1 Barn. & Ad. 436, 437.)

Notice of
condition.

Where a party is really ignorant of the existence of an instrument in which the condition is contained, and where he would have a good title if there were no such instrument, a neglect of the terms of the condition will not subject him to a loss of the estate, and the party entitled to avail himself of the condition must take care to make it known to the person who was to comply with it. (*France's case*, 8 Rep. 89 b.; *Shep. T.* 148; *Mallon v. Fitzgerald*, 3 Mod. 28; *Skinn.* 125; *Doe d. Kenrick v. Lord W. Beauclerk*, 11 East, 657.) An heir at law, to whom a devise is made upon condition, is not liable to lose his estate by a breach of the condition, unless he has notice of the devise which contains it; and the *onus* of proving that the notice has been given, lies upon the party entitled to the benefit of the breach of the condition. (*Doe d. Taylor v. Crisp*, 1 P. & Dav. 37; 8 Ad. & Ell. 779; 2 Jur. 943.)

Reversioner.

Reversioner
to have a new
right.

V. Provided also, that a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent. (*s*)

(*s*) By this section the remainder-man is not bound to enter for a forfeiture until his estate fall into possession, nor is the right affected by a possession by him, or any person through whom he claims, previously to the creation of the estate which shall have determined. But it will be seen by the 20th section (*post*), that several rights in the same person may, contrary to the rule which previously prevailed, be barred without any new allowance.

Administrator.

VI. And be it further enacted, that for the purposes of this act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration. (s)

An administrator to claim as if he obtained the estate without interval after death of deceased.

(i) In the case of intestacy, it had been decided that, as to all rights occurring after the death of the intestate, the statutes of limitation only began to run from the grant of administration. Hence a right to a chattel interest in lands might have been kept alive, notwithstanding adverse possession, to the expiration of the term, however long, and instances had occurred of serious practical inconvenience from that state of the law. The object of this clause of the act is to make the period of limitation with respect to chattel interests in land begin to run from the time when the right of entry arose and might have been acquired by taking out letters of administration. The next of kin and creditors of the intestate will have no just cause of complaint, if for twenty years they neglect their rights, and great injustice might be done to the party in possession by allowing a stale demand to be brought forward after a longer lapse of time. (See 1st Real Prop. Rep. p. 48.) The above enactment will, it is apprehended, apply to an administrator suing for the subjects mentioned in the 40th, 41st, and 42d sections of the act, see *post*. The utility of the alteration will be further apparent on reference to the previous state of the law.

Old rule that statute of limitations ran from grant of administration.

The distinction between an administrator and an executor is, that an administrator derives his title wholly from the ecclesiastical court, and has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. (*Woolley v. Clark*, 5 B. & Ald. 744.) An executor, on the other hand, derives his title from the will itself, and the property vests in him from the moment of the testator's death. (*Hickman v. Walker*, Willes, 27.) Thus where a term was granted in remainder expectant on another existing term, and before the expiration of the first term the grantee died; at the expiration of the first term the lessor entered and levied a fine before administration granted; and after the five years' nonclaim on the fine had run, letters of administration were obtained of the effects of the person entitled to the reversionary term, and it was held that the administrator should have five years from that time, as there was no right of entry before. (*Stanford's case*, Cro. Jac. 61, cited in *Cory v. Stephenson*, 2 Salk. 421; S. C. Carth. 335;

Skinn. 555; 4 Mod. 376.) In another case there was a term of years to A. for life, remainder to B. for life remainder to C., who died in 1736; A. in 1757; B. in 1781. Administration of the effects of C. was first granted in 1781, *eighty years from his death*, and his administrator brought ejectment; he was nonsuited at the trial, but the Court of Common Pleas granted a new trial. (*Fairclain v. Little*, 10 B. & Ald. 214.)

In an action by an administrator against the acceptor, of a bill of exchange, payable to the testator, but accepted by him before his death, it was held, that the statute of limitations began to run from the time of granting the letters of administration, and not from the time the bill became due, there being no cause of action until there was a party capable of suing. (*Murray v. The East India Company*, 5 Barn. & Ald. 20; and see *Pratt v. Swaine*, 8 Barn. & Cr. 285; *Perry v. Jenk*, 1 M. & Cr. 118; *Hyde v. Price*, 1 C. P. Coop. 196; *Fry v. Cranfeldt*, 3 M. & Cr. 499; *Hewitt v. Lambert*, 1 Ir. R. 263; Wms. Law of Executors, 395, 399.) The statute of limitations is not a good plea where an executor has not taken out administration; because no laches can be imputed to the plaintiff for not suing whilst there was no executor against whom he could bring his action. (Coop. Eq. Pl. 253; Vern. 694; 1 Eq. Cas. Abr. 305.) But where the defendant had possessed the personal estate and might have been sued as executor *de son tort*, his plea of the statute of limitations was allowed, although he had not taken out probate some years after the testator's death. (*Webster v. Webster*, 10 Ves. 93.) It is no answer to a plea of the statute of limitations, that after the cause of action accrued, and after the statute had begun to run, the debtor within the six years died, and that (by reason of litigation as to the right of probate) the executor of his will was not appointed until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted. (*Rhodes v. Smethurst*, 4 Mees. & W. 42.)

Where letters of administration have been granted, the administrator is entitled to all the rights which the intestate had at the time of his death vested in him; although no right of action accrues to the administrator until he has obtained letters of administration. (*Pratt v. Swaine*, 8 Barn. & Cr. 285; 8 S. C. 2 Mann. & Ryl. 350.) An executor or administrator is not deemed to be in possession of things immovable, leases for years or houses, before entry, (Wentw. Off. Ex. 2, 14th ed.); although a reversion of a term, which testator granted for part of the term, is in the executor immediately after the testator's death. (*Trattle v. King*, T. Jones, 170.) If the relation of the grant of administration to the death of the intestate did not, it seems, divest any right legally vested in another between the death of the intestate and the grant, so as to enable an administrator, who had obtained letters of ad-

ministration after an execution issued against the intestate's land, to call on the sheriff to pay one year's rent, pursuant to Stat. 8 Ann. c. 17. (*Waring v. Densbury*, Gilb. Eq. Rep. 22, cited in 1 Str. 97; *Fortesc.* 360; S. C. Vin. Abr. Excessum, (Q.)) It seems that the grant of administration will have the effect of vesting leasehold property in the administrator by relation, so as to enable him to bring actions in respect of that property for all matters affecting the same subsequent to the death of the intestate, and to render him liable to an account for the rents and profits of it from the death of the intestate. (*Rex v. Insh. Horsely*, 8 East, 410.) And in appointment by an administrator, the demise may be laid on a day after the intestate's death, but before the administration granted. (Selw. N. P. 716, 10th ed.; *Lessee of Patten v. Patten*, Alcock & Napier, 493, Ir.)

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Tenancy at Will.

VII. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee. (t)

In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

(t) Under the 2nd section (which limits the time for recovering lands by action to twenty years after the right accrues), s. 24, (which extinguishes the title at the determination of such period,) and s. 7, (which enacts that, in the case of a tenancy at will, the right of action shall be deemed to have accrued at the determination, or at the end of one year from the commencement of such tenancy) no title accrues to a party who was tenant at will, and held without interruption for twenty years after the expiration of the first year, but who had quitted possession before the act passed. It appeared that in 1807, W. T. being tenant in fee of the premises in question, put his eldest son, James, in possession of them, which possession

Construction of this section.

James kept till 1831, when he died. His widow, the defendant, had continued in the occupation ever since. W.T. died in September, 1833, having devised all his property to trustees. The lessor of the plaintiff was the eldest son of J. T., and claimed as his heir at law: no proof of title was given for the defendant. It did not appear that W. T., or the devisees, had made any entry before December 31, 1833. The jury found that J. T., the lessor of the plaintiff, was tenant at will to W. T. in 1807, and that no rent was paid to or profits received by W. T. for twenty years from that time. It was contended that the 7th section of 3 & 4 Will. 4, c. 27, operated retrospectively, and that from the end of the first year of J.T.'s tenancy the right of W. T. was as much barred as if there had been a possession adverse to him for twenty years. The court, however, held that no title accrued to the party who was tenant at will, but who had quitted possession before the act passed. The case would have been quite different if the tenant at will had continued in possession. (*Doe d. Thompson v. Thompson*, 6 Ad. & Ell. 721; 2 Nev. & P. 656.)

Where A., in 1817, let B. into possession of lands as tenant at will, and in 1827, A. entered upon the land without B.'s consent and cut and carried away stone therefrom, it was held, that this entry amounted to a determination of the estate at will; and that B. who continued in possession as before thenceforth became tenant at sufferance, until by agreement express or implied a new tenancy was created between the parties; and therefore that unless the fact of such tenancy were found by the jury, an ejectment brought by A. in 1839 was too late, inasmuch as by the stat. 3 & 4 Will. 4, c. 27, s. 7, his right of action first accrued at the expiration of one year after the commencement of the original tenancy at will, that is, in the year 1818. But the court granted a new trial, in which the question for the jury would be, whether a new tenancy at will was created after the determination of the old one in 1827, as the effect of a determination of the tenancy at will was to make a tenancy by sufferance only, during which the landlord might have brought ejectment without any demand of possession or other act, and such tenancy at sufferance would continue until the parties created a new tenancy at will by fresh agreements between them express or implied. (*Doe d. Bennett v. Turner*, 7 Mees. & W. 226.) Parke, B. said, "If the tenancy throughout the whole period had been one continuous tenancy at will, or if, when the original tenancy at will was determined in 1827, no new tenancy at will had been created, but the tenant had continued to occupy merely as tenant by sufferance, in either of these cases the right to bring an action, which, by the express provision of the 7th section, undoubtedly accrued to the lessor of the plaintiff in 1818, would have continued uninterrupted during the succeeding twenty years, and not having been exercised during that period would have been barred. (Ib. p. 234.)

Creation of

An estate at will, being the lowest estate which can arise

by the agreement of the parties, is not bounded by definite tenancy at will with respect to time; but as it originated in mutual agreement, so it depends upon the concurrence of both parties. (See Litt. ss. 68, 82.) As it depends upon the will of both, although it is expressed to be at the will of one only, (Co. Litt. 50 a.) the dissent of either may determine it. An estate at will may arise by implication, as well as by express words. The definition of an estate at will is, "where lands and tenements are let by one man to another, to have and to hold at the will of the lessor, and the tenant by force of this lease obtains possession." (Litt. s. 68; 2 Bl. Comm. 145.) Thus, where a person makes a feoffment, and delivers the deed to the feoffee, without giving him livery of seisin, and the feoffee enters, he becomes tenant at will. (Litt. s. 70.) And a person who entered and enjoyed lands under a void lease, and paid rent, was held to be tenant at will. (*Denn v. Fearnside*, 1 Wils. 176.) A person who lives in a house rent free by the sufferance of the owner is a tenant at will. (*Rex v. Collett*, R. & R. C. C. 498; *Rex v. Jobling*, Ib. 525; 2 Russ. C. & M. 28. See *Rex v. Fillongley*, 1 T. R. 458; Cald. 569.) Under an agreement to let premises so long as both parties like, and receiving a compensation accruing *de die in diem*, and not referable to a year or any aliquot part of a year, a tenancy at will, strictly so called, is created. (*Richardson v. Langridge*, 4 Taunt. 128.) An entry by a person under a contract for the purchase of an estate, or an agreement for a lease, with the consent of the vendor, or of the person agreeing to grant the lease, will create a tenancy at will between the parties. (*Hagen v. Johnson*, 2 Taunt. 148; *Dunk v. Hunter*, 5 B. & Ald. 322; *Doe v. Lawder*, 1 Stark. 308; *Right v. Beard*, 13 East, 210; *Doe v. Jackson*, 1 Barn. & C. 448; *Doe v. Sayer*, 3 Camp. 8.) If there be an agreement to purchase, and the intended purchaser is *thereupon let into possession*, such possession is lawful, and amounts at law, strictly speaking, to a bare tenancy at will. (*Right d. Lewis v. Beard*, 13 East, 210.) It is not, however, the agreement, but the letting into possession, that creates such tenancy; for the person suffered so to occupy cannot, on the one hand, be considered as a trespasser when he enters, and, on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law. (1 Mees. & W. 700.) A party who has been let into the possession of land under a contract for sale which has not been completed, is a tenant at will to the vendor. (*Reil v. Callimore*, 2 Cr. M. & R. 120; 1 Gale, 96.) Where a party was let into possession of land under an agreement of purchase, he paying interest after the rate of 5l. per cent. per annum on the purchase money until the completion of the purchase, which was to be in three months; and the purchase not being completed, he continued in possession on the same terms: it was held, that this was only a tenancy at will, which might be determined without notice to quit. (*Doe d. Tomes v. Chamberlaine*, 5 Mees. & W. 14. See *Saunders v. Musgrove*,

8 B. & C. 624; 9 D. & R. 529; *post*, p. 157.) But where the purchaser is already in possession as tenant from year to year, must depend upon the intention of the parties, to be collected from the agreement, whether a new tenancy at will is created or not, and from what time. A party who occupied a house as tenant from year to year, entered into the following agreement with his landlord:—"1831, Sept. 2: S. S. (the tenant) purchased an estate in the parish of C., bought of R. G. (the landlord), at the sum of 100*l.*; received on account, 10*l.* Mr. R. G. is willing to let the same lie by paying 4 per cent." It was held, that as there was an implied condition in the contract, that the landlord should make out a good title, the agreement for the purchase did not operate as a surrender of the tenancy by operation of law. It seems, however, that the true construction of the agreement had been, that from a certain time the defendant was to be absolutely a debtor for the purchase money, paying interest on it, and to cease to pay rent from year to year, a tenancy at will would have been created after that time; and the acceptance of such new demise a will would then have operated as a surrender of the interest from year to year by operation of law. (*Doe d. Gray v. Stanton*, 1 Mees. & W. 695. See *Souter v. Drake*, 5 B. & Ad. 992; 3 Nev. & M. 40, as to obligation to make a good title.)

Determina-
tion of
tenancy at
will.

The most obvious mode of determining an estate at will is an express declaration, that the lessee shall hold no longer either made on the land, or by notice given to the lessee (Co. Litt. 56, b.) Any act of ownership exercised by the landlord, which is inconsistent with the nature of the estate will operate as a determination of it. (*Id.*; Co. Litt. 245, b.) Thus any conveyance by the lessor of the property, held at will, is evidence of dissent, and operates as a determination of the will. (*Dinsdale v. Iles*, 2 Lev. 88.) It may be determined by demand or by entry. (*Doe d. Tomes v. Chamberlain*, 5 Mees. & W. 16.) It is clearly laid down, "that if the lessor, without the consent of the lessee, enter into the land, and cut down a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawful, albeit the will doth continue." (Co. Litt. 56, b.) So a tenancy at will is determined by the landlord's entry on the land without the consent of the tenant, and cutting and carrying away stone therefrom. (*Doe d. Bennett v. Turner*, 7 Mees. & W. 226.) So in *Ball v. Culismore*, (2 C. M. & R. 120,) it was held, that a feoffment by the lessor, with livery of seisin on the land, operates as a determination of the will, although the tenant at will be off the land at the time when the livery is made, and have no notice of the determination of the will, the general rule of law being, that any act done upon the land by the lessor in assertion of his title to the possession determines the will. A tenancy at will is determined by an agreement to purchase. (*Daniels v. Da-*

tion, 16 Ves. 252.) A letter from the owner to the tenant at will, stating that unless the latter paid what was due to the lessor, immediate measures would be taken to recover possession of the property, was held sufficient to determine the estate at will. (*Dee v. Price*, 9 Bing. 356; 2 M. & Scott, 464.) Neither party can determine an estate at will at a time which would be prejudicial to the other. (Co. Litt. 55, b, n. 16; *Lighth v. Theod.*, 1 Ld. Raym. 707; *Peacock v. Peacock*, 16 Ves. 57.)

The relation between mortgagor and mortgagee is perfectly anomalous, and *sui generis*. (2 Jac. & Walk. 183.) The mortgagee is only like a tenant at will to the mortgagor, his legal interest being inferior to that of a strict tenant at will. (Demp. 22, 282, 283.) A mortgagor in possession may be disturbed in pleading as the tenant of the mortgagee in an action by a third party. (*Partridge v. Bere*, 5 B. & Ald. 604; 8 C. 1 Dowl. & Ry. 273.) The legal interest of the mortgagor after default is not more than that of a tenant by sufferance, and he may be treated as such, or as a trespasser, at the election of a mortgagee, (*Dee v. Maisey*, 8 B. & Cr. 761. See *Wheeler v. Montagu*, 1 Gale & D. 493,) and the mortgagor or his tenant coming in after the mortgage, may be ejected without any demand of possession having been made (Id.) either by the original mortgagee or by his assignee; (*Thurder v. Belcher*, 3 East, 449;) whereas a tenant at will cannot be ejected on a demise laid previous to the determination of the will, (4 T. R. 680,) and the mortgagor is not entitled to the growing crops after the will is determined, as in the case of a tenant at will. (1 T. R. 383. See *Caste on Mortgages*, 325—330; *Powell on Mortgages by Cov. c. vii.*; 5 B. & Ald. 606, n.) "It is now established, that a mortgagor only holds the possession of the land, and receives the rent of it, by the will or permission of the mortgagee, who may by ejectment, *without giving notice*, recover against him or his tenant. In this respect, the estate of a mortgagor is inferior to that of a tenant at will." (Per *Buller*, 1, in *Bird v. Wright*, 1 T. R. 378. See 4 Bligh, 97.) A mortgagee may consider the mortgagor, as against a stranger, as his tenant at will; but he is not bound to do so, and therefore it is that he may bring ejectment against him as a trespasser, without a previous demand of possession. (*Partridge v. Bere*, 5 B. & Ald. 604; *Hitchman v. Walton*, 4 Mees. & W. 415; *Dee d. Garred v. Olley*, 12 Ad. & Ell. 481.) In *Bur d. Higginbotham v. Barton*, 11 Ad. & Ell. 314, *Denman*, C. J., said, "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other in any other terms than those very words; but thus much is established by the cases of *Partridge v. Bere*, 5 B. & Ald. 604, and *Hitchman v. Walton*, 4 Mees. & W. 415, that the mortgagee may treat the mortgagor as being rightfully in possession, and himself as reversioner, so that as long as he is not treated as a trespasser, his possession is not

Relation between mortgagee and tenant of mortgaged estate.

hostile to, nor inconsistent with the mortgagee's right. (We purposely avoid the expression 'is not adverse, by reason of the statutes 3 & 4 Will. 4, c. 27, and 7 Will. 4 and 1 Vict. c. 28.')" Where a mortgagee recognizes a tenant as being in lawful possession of the premises at a given time by the receipt of rent, it is not competent to him to say afterwards that at that time he was a trespasser. (*Doe d. Whitaker v. Hales*, 7 Bing. 322.) But in ejectment by a mortgagee, the mere fact of his having received interest on the mortgage down to a time later than the day of the demise in the declaration, does not amount to a recognition by him that the mortgagor or his tenant was in lawful possession of the premises till the time when such interest was paid, and consequently is no defence to the ejectment. (*Doe d. Rogers v. Cadwallader*, 2 Barn. & Ad. 473.)

A court of equity will not interfere to prevent a mortgagee from assuming the possession of the estate. (2 Mer. 359; 2 Jac. & W. 183.) From the time a mortgagee gives notice to a tenant to pay the future rents to him, such tenant ceases to occupy by the permission and sufferance of the mortgagor, but begins to hold by the permission and sufferance of the mortgagee. (*Waddilove v. Bernet*, 2 Bing. N. R. 542, 543.) Where a lease is granted by a mortgagor after the date of the mortgage, notice by the mortgagee to the tenant to pay the rent due does not constitute a tenancy between the mortgagee and tenant, so as to enable the mortgagee to distrain for rent in arrear after the notice; and where, after notice, the mortgagee distrains for half a year's rent, and rent was paid by the tenant subsequently to such distress, this will not constitute a tenancy by relation back, so as to entitle the mortgagee to distrain for the rent due previously. In an action of replevin, the distress had been taken by a mortgagee, who had become such previously to the lease granted by the mortgagor to the plaintiff. The mortgage money being unpaid, the mortgagee gave notice to the tenant to pay him the rent, and distrained on his refusal to do so. The question was raised whether the tenant of a mortgagor, by virtue of a lease posterior to the mortgage, becomes tenant to the mortgagee as soon as the latter gives him notice that there is a mortgage, and that the money has not been paid. *Denman, C. J.*, was of opinion, that by the mere fact of notice that the mortgage money remained unpaid, the mortgagee could not forthwith cause the tenant to hold of the mortgagee. He was led to that conclusion by the injustice which he thought would result from declaring that he possessed this privilege. As against the mortgagor, he might take possession the moment the condition is broken; but if he chooses to permit him to retain possession, and to lease the premises, he cannot afterwards tell the lessee that he was deceived, and that the mortgagor was not the owner. The tenant clearly cannot deny his lessor's title, or protect himself against him by paying his rent to any other person. The tenant's attornment is at least necessary to create this relation, and the court were all of opinion that the subsequent attornment, which was proved

in this case, could not have the effect of setting up the mortgagee's title by relation from the period when notice was given. (*Leam v. Elliot*, 9 Ad. & Ell. 353, 354; 1 P. & Dav. 256; see *Rogers v. Humphreys*, 4 Ad. & Ell. 313.) Where a lease is made by the mortgagor subsequently to the mortgage, and the mortgagee afterwards requires the rent to be paid to him, and it is paid accordingly, the relation of landlord and tenant may arise between the parties, or at all events, the mortgagee may be entitled to sue the tenant for use and occupation. (*Doe d. Higginbotham v. Barton*, 11 Ad. & Ell. 315; 3 P. & Dav. 194; 4 Jur. 432.)

The plaintiff was in possession of land under a lease granted to him by W. B., who had previously mortgaged the premises. The transferees of the mortgage (being cognizant of the lease) gave the plaintiff notice of the mortgage, and required him to pay all the rent due, and to become due in respect of the mortgaged premises; it was held that this was evidence whence the jury might infer a contract of tenancy for a year, as between the mortgagees and the plaintiff. (*Brown v. Storey*, 1 Mann. & G. 117; 1 Scott, N. R. 9.)

M. being seised in fee of land, mortgaged to O., but remained in possession, and afterwards demised part for a term to B., who also entered; after which M. mortgaged to H.; H., after this, received rent from B., and demised the other part to A.; afterwards B. and A., on notice from O., paid O. rent; H. then brought ejectment, after notice to quit, against B. and A.: it was held that B. and A. might both show in defence the first mortgage to O., O.'s notice to them, and their payment of the rent to O. For that, although B. could not dispute M.'s title at the time of the demise, he might show that H. had no derivative title from M., and he was not precluded by having paid rent to H. under a mistake of the facts. That A., by showing that M. at the time of the demise to him, was only mortgagor in possession, did not impugn M.'s right to confer upon him, by the demise, a legal title to the possession, but might show that M. had since been treated as a trespasser by the mortgagee, so as to determine M.'s right, and that O.'s notice to the tenant to pay him the rent might, if read in evidence, tend to show that by so doing O. treated the mortgagor as a trespasser. (*Doe d. Higginbotham v. Barton*, 11 Ad. & Ell. 307.)

If a person who has an estate borrows money on it upon mortgage, and the mortgagor afterwards grant a lease of the property to a tenant, E. G., for twenty-one years, that lease, being made after the mortgage, cannot be set up by the tenant to prevent the mortgagee from recovering the possession of the property, and the mortgagee may put the tenant out of possession by an ejectment, and the only remedy the tenant has for thus being put out of possession is against the mortgagor. But if, instead of the mortgagee turning the tenant out of possession, he consents to take the tenant as his tenant, the mortgage will not thereby set up the twenty-one years lease, but

will make the tenant his tenant from year to year only. (*Doe d. Hughes v. Bucknell*, 8 Car. & P. 567.)

Under a mortgage deed, containing the usual covenant that the mortgagees may enter after default made in payment of the mortgage money, the mortgagees may maintain an ejectment against the mortgagor without previously demanding the possession. (*Doe d. Fisher v. Giles*, 2 M. & P. 749; 5 Bing. 421. See *Doe d. Roylance v. Lightfoot*, 8 Mees. & W. 553; *post*, s. 28 n.)

What will
amount to a
lease.

Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are in themselves sufficient, and will, in construction of law, amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose. (Bac. Abr. Leases, K. cited by Tindal, C. J., 3 Bing. N. C. 532.) Therefore where the mortgagor conveyed land in fee with a proviso for redemption on payment of principal in June 1833, but it was agreed that the mortgagee should not call in the principal till 1840, if interest were regularly paid in the mean time; and that the mortgagor should hold the premises and take the rents, issues, and profits for his own use till default should be made in the payment of the principal and interest as aforesaid: it was held, that this operated as a redemption to the mortgagor till 1840. (*Wilkinson v. Hall*, 3 Bing. N. C. 508, 4 Scott, 301. See *Doe d. Roylance v. Lightfoot*, 8 Mees. & W. 564; *Wheeler v. Montefiore*, 1 Gale & Dav. 493.) The statute of limitations did not apply to cases where a mortgagor occupied by the permission of the mortgagee; and payment of interest on the mortgage was conclusive evidence of a continuing tenancy, and therefore a fine levied by a mortgagor in possession, whether the mortgage were in fee or for a term of years, unless he held in opposition to the will of the mortgagee, did not operate to displace or divest the right of the mortgagee, and did not require any entry to avoid it. (*Freeman v. Barnes*, 1 Lev. 272; S. C. 1 Vent. 82; *Doe d. Tarrant v. Hallier*, 3 T. R. 173; 2 Ves. sen. 482; *Hall v. Doe d. Surtees*, 5 Barn. & Ald. 687; 8 C. 1 Dowl. & Ry. 340.) Upon the same principle a fine and non-claim by a mortgagee in possession did not bar the equity of redemption in the mortgagor. (*Weldon v. York*, 1 Vern. 132; *Kennedy v. Daly*, 1 Sch. & Lef. 380.) So before the stat. 3 & 4 Wm. 4, c. 27, twenty years' possession by a mortgagor would not bar the mortgagee, unless it were shown that the former held in opposition to the will of the latter. (*Hall v. Doe d. Surtees*, 5 Barn. & Ald. 687. See *post*, s. 28.)

Relation be-
tween trustee
and cestui
que trust.

A *cestui que trust* is not to be deemed a tenant at will within the 7th section to his trustee. The general rule is, that a *cestui que trust* being in possession of the estate, with the consent, or even the mere acquiescence of the trustee, is considered as his tenant at will. (4 Bac. Abr. 198; *Smith v. Pierce*, 3

Mod. 196; *Focus v. Salisbury*, Hardr. 400; *Freeman v. Arnes*, 1 Vent. 55, 80; 1 Lev. 270; *Pomfret v. Windsor*, 2 Va. an. 472, 481; 1 Vent. 329; *Gree v. Rolle*, 1 Ld. Rym. 716.) The doctrine that the legal estate cannot be set up at law by a trustee against his *cestui que trust* has been long repudiated. (*Doct. d. Shewen v. Wroot*, 5 East, 138. See *Leases of Massery v. Touchstone*, 1 Sch. & Lef. 67, n.) It is a rule, that however plain the trust may be, yet in a court of law the legal interest must prevail, (*Doct. d. Da Costa v. Wharton*, 8 T. R. 2.) therefore trustees of a meeting-house or of lands, of which they are seised in trust for the support of the minister, may maintain an action of ejectment against him upon a simple demand of possession without any notice to quit. (*Doct. d. Jones v. Jones*, 10 B. & C. 718; 5 M. & R. 616; *Doct. d. Nicholl v. McKee*, 10 B. & C. 724; 5 M. & R. 620.) But the trustees and visitors of a free grammar school cannot recover the schoolhouse in ejectment without having previously determined his interest by summons. (*Doct. d. Thonet v. Gartham*, 8 Moore, 368; 1 Bing. 357. See *Rex v. Gadsby*, 8 T. R. 209.) The relation between them is not analogous to that between mortgagor and mortgagee, as equity never takes away the possession of the *cestui que trust* by delivering it to the trustees, unless there be gross mismanagement, or some other reason for it, (9 Mod. by Leech, p. 227.)

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Tenancy from Year to Year.

VIII. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen.) (u)

No person after a tenancy from year to year to have any right but from the end of the first year or last payment of rent.

(u) An estate from year to year may be created either by the oral or written agreement of the parties. The qualities that distinguish it from proper terms of years, and from estates at will, are, that it is now raised by construction of law alone instead of an estate at will, in every instance where a possession is taken with the consent of the legal owner, and where an annual rent has been paid, but without there having been Creation of tenancy from year to year.

any conveyance or agreement conferring a legal interest; and that whether it arises from express agreement, or by implication of law, it may, unless surrendered or determined by regular notice to quit, subsist for an indefinite period, if the estate of the lessor will allow of it, or for the whole term of his estate, where it is of a limited duration, unaffected by the death either of the lessor or lessee, or by a conveyance of the estate by either of them. (*Birch v. Wright*, 1 T. R. 380.) Although *prima facie* all leases for uncertain terms create a tenancy at will, the courts of law have for some time past inclined to construe such leases to constitute a tenancy from year to year, especially where an annual rent is reserved. (3 Burr R. 1609, *Roe v. Lass*, 2 Bl. R. 1171; *Doe v. Weller*, 7 T. R. 478.) A tenant at will at a yearly rent is tenant from year to year. (*Pope v. Garland*, 4 Y. & Coll. 399; *Doe v. Watts*, 7 T. R. 83; *Doe v. Morse*, 1 B. & Ad. 365.)

Payment of rent is *prima facie* evidence of a tenancy from year to year. (*Doe d. Pritchard v. Dodd*, 2 Nev. & P. 838; 5 B. & Ad. 689.) A demise "not for one year only but from year to year" operates as a demise for two years, and consequently the tenant cannot be ejected after a notice to quit at the expiration of the first year. (*Denn v. Cartwright*, 4 East, 31.) A lease for one year and so on from year to year, until the tenancy hereby created shall be determined as hereafter mentioned, with a provision that it should be lawful for either of the parties to determine the tenancy by three months' notice, creates a tenancy for two years certain, and cannot be terminated by a three months' notice to quit at the end of the first year. (*Doe d. Chadborn v. Green*, 1 Perry & Dav. 454; see *Buckworth v. Simpson*, 1 Cr. M. & R. 834; 5 Tyr. 344.)

A tenancy from year to year will not arise by implication where it will work a forfeiture. (*Fenny v. Child*, 2 Maule & S. 255.)

A tenant who holds on after a term has elapsed goes on as tenant from year to year, because in the silence of the parties no other terms can be implied. (*Doe d. Rogers v. Pullen*, 2 Bing. N.C. 753.) A tenant for life under a settlement made a lease for lives not warranted by his leasing power, and after his death and that of the last *cestui que vie*, the remainder-man continued to receive of the lessee rent of the same amount as that reserved by the lease, which was far below the real value of the lands. There was evidence from which it might be inferred that the lease in question had been since the death of the last *cestui que trust* treated by both parties under a mistake, as a renewal in pursuance of a supposed covenant for perpetual renewal in a former lease. It was held, in an ejectment on the title brought by the remainder-man, that the lessee was a tenant from year to year since the death of the last *cestui que vie* and was entitled to a notice to quit. (*Bell v. Nangle*, 2 Jebb & Symes, 259. See *Doe d. Martin v. Watts*, 7 T. R. 83; *Howard v. Sherwood*, 1 Alcock & Nap. 217.) An undertenant who is in possession

at the determination of the original lease, and is permitted by the reversioner to hold over, is a quasi tenant at sufferance, and the mere fact of occupation, coupled with payment of rent for such time of occupation, does not raise the presumption of a demise for years, unless there is some evidence to show an agreement for a demise for a term. (*Simpkin v. Ashurst*, 4 Tyrw. 781; 8. C. 1 Cr. Mees. & Roec. 261.) So long as the occupation is merely continued with the bare acquiescence or without the disagreement of the person entitled to the possession, a tenancy at sufferance exists. (*Sykes v. Murphey*, 1 T. R. 161; *Co. Litt.* 270 b.; *Co. Jac.* 169.)

Where a party enters into possession of a farm, and pays rent under an agreement for a lease containing divers covenants applicable to a tenancy from year to year: it was held, that where the agreement stipulated for the lease to contain a condition of re-entry, if the tenant should grow two successive crops of white corn without fallowing, that he might be ejected without notice if he committed a breach of the covenant. (*Doe v. Thompson v. Amsy*, 4 P. & Dav. 177; see *Lord Bolton v. Tomlin*, 1 Nev. & P. 247; 5 Ad. & Ell. 856.)

Defendant in possession under a lease for fourteen years, assigned the lease by way of mortgage to the plaintiff, and then committed a forfeiture, for which an ejectment was brought. It was then agreed at a meeting of all the parties, that judgment should be signed in the ejectment, that the lessor should grant a new lease to the plaintiff, and that the plaintiff should grant an underlease to the defendant. The new lease was accordingly granted to the plaintiff, who then delivered to the defendant the key, saying "Go on as usual, pay the money (due on mortgage), and when you have done so, you shall have an underlease." It was held, that the defendant upon being let into possession under these circumstances, did not become tenant from year to year, and was not entitled to six months' notice to quit. (*Doe v. Rogers v. Pullen*, 2 Bing. N. C. 749; 3 Scott, 245.)

Where in an agreement for the sale and assignment of certain premises, there was a stipulation "that in the meantime and until the assignment was made, the intended purchaser should pay and allow to the seller at the rate of 100*l.* per annum from the time of taking possession of the premises until the completion of the purchase," the intended purchaser having taken possession, and one half yearly payment having become due before the completion of the purchase: it was held, that it was due as rent, the relation of landlord and tenant at a fixed rent of 100*l.* per annum, payable half-yearly, to commence from the time of possession of the premises, having been created between the vendor and purchaser. The sheriff therefore levying on the goods of the occupier under a *fi. fa.* was bound by the 8 Anne, c. 14, to pay it over to the seller as landlord. (*Saunders v. Musgrave*, 6 B. & C. 524; 9 D. & R. 529; see *Doe v. Tones v. Chamberlaine*, 5 Mees. & W. 15;

Hope v. Booth, 1 B. & Ad. 496; *Seaton v. Booth*, 4 Ad. & Ell. 528. See *ante*, p. 149.)

Where a party is let into possession of land under a contract of purchase, which afterwards goes off, he is liable to an action for use and occupation at the suit of the vendor, for the period during which he continues in possession after the contract went off. (*Howard v. Shaw*, 8 Mees. & W. 118; *Kirtland v. Pounsett*, 2 Taunt. 45.)

A tenancy from year to year is to be considered as recommencing every year, and therefore an allegation that a party held under a demise from year to year, commencing from 16th November, 1836, is supported by proof of a tenancy commencing several years before, and still continuing at that time. (*Tomkins v. Lawrence*, 8 Carr. & P. 729.) The nonpayment of rent for sixteen years, and no proof of any demand being made, is of itself sufficient evidence to presume the determination of a tenancy from year to year. (*Stagg v. Wyatt*, 2 Jur. 892.)

Though a *parol* agreement for a longer term than three years is void by the statute of frauds, 29 Car. 2, c. 3, s. 1, as to the duration of the term, yet it creates a tenancy from year to year regulated in every other respect by the agreement. (*Doe v. Bell*, 5 T. R. 471; *Clayton v. Blakey*, 8 T. R. 3. See *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680.) The interest of a tenant from year to year does not determine by his death, but devolves to his personal representatives, (*Doe v. Porter*, 3 T. R. 13; 15 Ves. 241.)

Notice to quit.

A tenant from year to year may be determined by a notice to quit from either party, which, when there is no agreement, or where the agreement is silent on that point, must be at least half a year's (and not merely six months) notice, requiring from the tenant, or offering on his part, to give up possession at the expiration of the year, computing from the time when the tenancy commenced. (*Right v. Darby*, 1 T. R. 159.)

Land was let for one year, and so on from year to year, until the tenancy should be determined as aftermentioned, with a subsequent proviso, that three months should be sufficient notice to be given from either party, and another subsequent proviso that it should be lawful for either party to determine the tenancy by giving three months' notice: it was held, that the tenancy was not determinable by three months' notice expiring before the end of the second year. (*Doe d. Chadborn v. Green*, 9 Ad. & Ell. 658; 1 P. & Dav. 454; see *Birch v. Wright*, 1 T. R. 378; *Denn d. Jenkin v. Cartwright*, 2 Camp. 572; *Thompson v. Maberly*, 4 East, 29.) A tenant from year to year, believing that his tenancy determined at Midsummer, gave a written notice to quit at that period, which the landlord accepted; the tenant having afterwards discovered that his tenancy expired at Christmas gave his landlord another notice accordingly, and on possession being demanded at Midsummer refused to quit the premises: it was held, that the tenancy was not determined by notice, inas-

such as it was not good as a notice to quit, and could not operate as a surrender by note in writing, within the statute of limits, being to take effect in future. (*Doe d. Murrell v. Milnerd*, 3 Mees. & W. 328; see *Johnstone v. Huddestone*, 4 B. & C. 922; *Weddall v. Capes*, 1 Mees. & W. 50.) Land and buildings were held by a yearly tenant, the land from 2nd February to 2nd February, the buildings from 1st May to 1st May. The landlord, on the 22nd October, 1833, served him with a notice to quit the lands and buildings, "at the expiration of half-a-year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said premises, or any part or parts thereof respectively shall expire after the expiration of half-a-year from the delivery of this notice:" it was held, that as to the lands, the notice was to be considered a notice to quit on 2nd February, 1835; and that the landlord might recover both land and buildings after that day in ejectment. (*Doe d. Williams v. Smith*, 5 Ad. & El. 350). As to requisites of notice to quit, see 2 Selw. N. P. 701, 705, 10th ed. A notice to quit given by a person authorized by one of several joint-tenants, purporting to be given on behalf of them all, is good for all, because the tenant holds the premises only so long as he and they all shall agree. (*Doe d. Adia v. Sammersett*, 1 B. & Ad. 135; *Doe d. Kinderley v. Hughes*, 7 Mees. & W. 139; see *Doe d. Mann v. Walters*, 10 B. & C. 626.)

A notice to quit cannot be required by a person holding adversely, but only where there is a subsisting tenancy on both sides, nor is it necessary where the tenant does an act which amounts to a disavowal of the title of the landlord. (*Doe d. Calvert v. Froud*, 1 Moore & P. 486.) In *Doe d. Williams v. Pasquati*, Peake's N. P. C., a refusal to pay rent to a devisee under a will, which was contested, was not such a disavowal of his title as to entitle such devisee to maintain ejectment without a previous notice to quit. (See post, p. 162.)

Lease reserving Rent.

IX. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease

Where rent amounting to 20s. reserved by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.

shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled. (x)

Nonpayment
of rent when
adverse pos-
session.

(x) In *Ex parte Jones*, 4 Y. & Coll. 467, reference was made to this section of the act, and it being contended that, upon that enactment, there was no adverse possession in a lessee, except by adverse payment of rent, *Abinger*, C. B. said, "that in his opinion if a landlord granted a lease subject to rent, and the party paid *no rent*, that would be adverse possession, as well as if the lessee paid rent to another person." (See *Doe d. Davy v. Ozenham*, 7 Mees. & W. 131; *ante*, p. 139, 140; *Grant v. Ellis*, *ante*, pp. 122—127.) But he added, "that in a case where no rent was reserved, the statute would not apply."

As cases in which a yearly rent under 20s. is reserved and cases where no rent is reserved do not come within the statute, it follows that such cases must be decided with reference to the law as it stood before this statute was passed. The old rule was, that in case of a lease, adverse possession, so as to bar the reversioner, did not commence till the expiration of the term. Before the new act, length of possession during a particular estate, as a term of 1000 years, or under a lease for lives as long as the lives were in being, gave no title; but if tenant *pur auter vie* held over for twenty years after the death of *cestui que vie*, such holding over would in ejectment be a complete bar to the remainder-man or reversioner, because the possession was adverse. (Cowp. 218.) The Real Property Commissioners observed, "Where rent is reserved on a lease, we consider it more reasonable that the limitation should run from the time when the rent began to be received by a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to the occupation of the soil; the person who is in the receipt of them can do nothing more to establish his right, and the person to whom they are demised is virtually dispossessed. Where *no rent*, or only a *nominal rent* is reserved, very slight negligence can be imputed to the reversioner in merely not requiring a recognition of his title from the tenant, and in such cases, till the expiration of the lease, we think there should not be a commencement of adverse possession to bar the landlord. Any rent less than 20s. a year may for this purpose be considered nominal." (1

Real Prop. Rep. 47.) Before the new act it was decided that the holding over for twenty years by a lessee for years determinable on lives at a nominal rent, who, at the commencement of such holding over, falsely asserted that one of the *coteneurs* *que* *ten* was alive, but omitted to pay the reserved rent, was not an adverse possession barring the entry or ejectment of the reversioner. So although the reversioner had notice of the cesser of the term, and granted a fresh lease to another person, who neglected to enter for more than twenty years. (*Re v. Inh. of Ashridge*, 4 Nev. & M. 477.)

The mere receipt of rent by a stranger, without colour of title, was not evidence of adverse possession against one who had the legal title, for it was no disseisin, but at the option of the latter, even although the stranger made a lease by indenture, reserving rent, unless he made an actual entry. (Bull. N. P. 104; 1 Roll. Abr. 659: and see *Smith v. Parkhurst*, Andr. 324; *Jayne v. Price*, 5 Taunt. 326; 1 Marsh. 68.) If there be a tenant at sufferance, and a stranger, not having any right to the land, make a lease to him by indenture, rendering rent, without putting the tenant by sufferance out of possession, and the tenant pay the rent to the stranger, that is not any disseisin to him who has the right. (1 Roll. Abr. 659, (C.) pl. 11.) So if a tenant at will made a lease for years, and the lessee entered, though the estate at will did not warrant the lease, it was only a disseisin at election. (*Blunden v. Baugh*, Cro. Car. 302.) For where a person gains a possession under a title consistent with that of the person having right, it is but a disseisin at election. (See 3 Ech. & Lef. 622; 1 Taunt. 599.)

Before the stat. 3 & 4 Wm. 4, c. 27, when there was a valid lease subsisting, the right of entry was preserved until the determination of the lease, although no rent had been received; (*Orrill v. Maddox*, Runn. Eject. App. No. 1;) and even the adverse receipt of rent for more than 20 years did not deprive the party of his right of entry on the determination of the lease. (*Doe v. Demers*, 7 East, 299. See *Bushby v. Dixon*, 3 Barn. & C. 236, 304, 305.) Although a void lease, or a term which had become attendant upon the inheritance for the benefit of the owner of it, did not prevent the running of the statute of limitations. (*Taylor v. Horde*, 1 Burr. 60.)

But where an estate had been in lease, and A. entered and received the rent during the continuance of the lease, and remained in possession more than twenty years from the time of his entry, and another person claiming the estate within twenty years after the expiration of the lease brought an ejectment and filed a bill for a discovery, it was held that the possession was adverse, as a bill might have been filed by the parties claiming during the whole time the leases were in existence, and a demurrer to the discovery was allowed, and assistance in equity refused. (*Cholmondeley v. Clinton*, Turn. & Russ. 107.)

A disclaimer imports a renunciation by the party of his landlord's character of tenant, either by setting up a title in another, or

Disclaimer of landlord's title.

by claiming title in himself. (1 Mann. & G. 139.) And if a tenant disavowed his landlord's title by attorning to another, and the landlord was apprised of it and acquiesced, the possession of his tenant became adverse, and the statute of limitations would have run against the landlord. (*Hosenden v. Lord Innesley*, 2 Sch. & Lef. 624.) Lord Rodedale observed, "The attornment of a tenant will not affect the title of the lessor so long as he has a right to consider the person holding the possession as his tenant. But as he has a right to punish the act of the tenant *disavowing the tenure* by proceeding to eject him, notwithstanding his lease, if he will not proceed for the forfeiture, he has no right to affect the rights of third persons, on the ground that the possession was betrayed; and there must be a limitation to that as to every other demand. But where there is no disavowal of the tenure, the mere non-payment of rent by the tenant for a number of years will not bar the remedies of the landlord at the expiration of the term, as the possession of a tenant entering under a lease is lawful as against his lessor, who was entitled to all his remedies for the rent." (2 Sch. & Lef. 625, 626.) The act of a tenant in setting up a title adverse to that of his landlord, in order to obtain the freehold, operates as a forfeiture of his term, and it is the same whether he does it himself, or assists another to do it. Whether he tries to get the freehold himself, or by collusion or connivance assists that result in favour of another, it operates equally as a forfeiture. Therefore where a termor, after deserting the demised premises, delivered up the possession of them with the lease, to a party who claimed by a title adverse to that of the landlord, with the intent to assist him in setting up that title, and not that he should hold *bona fide* under the lease, it was held that the term was forfeited by such act of betraying possession. (*Doe d. Ellerbrock and others v. Flynn*, 1 Cr. M. & R. 137; 4 Tyrw. 619.) But a tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own. (*Doe d. Graves v. Wells*, 10 Ad. & Ell. 427.) In order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant; or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it. An omission to acknowledge the landlord as such by requesting further information will not be enough, nor will a mere refusal to pay rent. (*Doe d. Williams v. Pasquati*, Peake, N. P. C. 196.) When a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, evidence of the disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy from its particular nature was limited. (10 Ad. & Ell. 436.) But though a leases set

up an adverse claim to the property in the premises he holds under the lease, yet that does not incapacitate him from maintaining possession under the lease, where the relation of landlord and tenant has not been actually abandoned. (*Rees v. Powell v. King, Fenest, 19.*) A tenant from year to year, who had agreed to buy his landlord's estate, having remained in possession for several years without paying either rent or interest on the purchase money, the agent of the lessor applied to him to give up possession, to which he answered that he had bought the property and would keep it, and had a friend who was ready to give him the money for it. This was held to be no disclaimer, because it was not a claim to hold the estate on a ground necessarily inconsistent with the continuance of the tenancy from year to year, (*Doe d. Gray v. Smeaton, 1 Macc. & W. 695; Tyr. & G. 1065.* See *Doe d. Williams v. Cooper, 1 Mann. & G. 135.*) It was held that payment of rent to another party without the consent or knowledge of the landlord, after an adverse possession of twenty-three years, did not amount to an attornment; and that the fraudulent act of a tenant in betraying the possession of his landlord by disclaiming tenure under him, and admitting a title in a third person, would not affect the landlord's title, so long as he had a right to consider the person as holding possession as tenant. (*Meradith v. Gilpin, 6 Price, 146.*) Payment of rent by a lessee to a lessor, after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired, and such knowledge is a fact to be decided by the jury. (*Fenner v. Duplock, 2 Bing. 10; 9 Moore, 38.*)

ENTRY.

X. And be it further enacted, that no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon (y). A mere entry not to be deemed possession.

(y) By stat. 21 Jac. 1, c. 16, it was enacted, that no entry should be made by any man upon lands, unless within twenty years after his right should accrue. An entry to avoid a fine with proclamations, though not authorized by the party in whose behalf it was made, is sufficiently ratified by an action of ejectment founded on it. (*Doe d. Blight v. Pett, 11 Ad. & Ell. 842; 4 P. & Dav. 278.*)

By the stat. 4 & 5 Anne, c. 16, s. 14, it was enacted, that no entry upon lands should be of force to satisfy the

statute of limitations, (21 Jac. 1, c. 16,) or to avoid a fine levied of lands, unless an action were thereupon commenced within one year after, and prosecuted with effect. (See 1 Wms. Saund. 319, n. (1); 10 B. & C. 848.) This clause in the act will have the effect of shortening the period within which an ejectment can be brought; for, under the statute of Anne, a party might enter just before the expiration of the twenty years, and commence his action within one year afterwards.

◆

CONTINUAL CLAIM.

No right to be preserved by continual claim.

XI. And be it further enacted, that no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action (z).

(z) Previously to the enactment in this and the preceding section an actual entry made by one who had a legal right to enter on an estate, or by his agent duly authorized by power of attorney, if made peaceably and repeated once in the space of every year and a day, (which was called *continual claim*,) was deemed sufficient to prevent the right of entry from being tolled by a descent cast or discontinuance, or barred by the statute of limitations. (Litt. ss. 414, 415; Runn. Eject. 51, 52, 2d ed.; Ad. Eject. 101, 3d ed.; *Ford v. Grey*, 1 Salk. 285.) Actual entry was sufficient to keep alive the right of a person disseised, but a mere demand, without process or acknowledgment, was not sufficient against the statute of limitations. (*Hodls v. Healey*, 1 Ves. & B. 540.)

◆

COPARCENERS, &c.

Possession of one coparcener, &c. not to be the possession of the others.

XII. And be it further enacted, that when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of

or by such last-mentioned person or persons, or any of them (a).

(a) This section has relation back as far as relates to the period of the act, and makes the possession of one coparcener, joint tenant, or tenant in common, who has been in possession of the entirety, separate from the time of his coming into possession. Therefore where one tenant in common has been out of possession for twenty years prior to the passing of the statute, he is barred by sections 2 and 12 from bringing his action, but may maintain it under section 15 within five years of the passing of the act, if the other tenant in common has not been in possession adversely to him at the time of passing the act. In 1799, D., M., and A., being entitled to a remainder in fee, as tenants in common, of lands then held by a tenant for life, D. and the tenant for life conveyed the third, in which D. had the remainder, to C., who thereupon entered into possession of the whole. In 1800, the tenant for life died, A. having died before. The heir at law of A. filed a bill in Chancery in respect of the land against C. In 1835, while the proceedings were going on, the said heir at law died, having devised to J. all his lands, &c. whether in his own possession or that of others, as far as he lawfully could, specifying those which he was seeking to recover from C. In 1836, the devisee's heir at law brought ejectment against C. for A.'s third part: it was held, that under sections 2 and 12 of stat. 3 & 4 Will. 4, c. 27, the defendant's possession could not be held to have been ever that of the other tenants in common, for that sect. 12 made the possession of tenants in common separate from the commencement of the tenancy in common, and not merely from the time of the act passing. That therefore sect. 2 would have barred the lessor of the plaintiff, but that his right was saved by sect. 15, the ejectment having been brought within five years of the passing of the act, and the possession of C. not being adverse to the other tenants in common, within the meaning of that section. (*Calley v. Doe d. Taylerson*, 11 Ad. & Ell. 1008; 3 P. & Dav. 539.) This statute is, to a certain degree, retrospective, as to the possession of tenants in common; and though before the act the separate possession of one coparcener, joint tenant, or tenant in common, of the entirety, or more than his individual share of such land, was not adverse as against the owners of the other shares, yet, by the operation of the act, the possession which was not adverse prior to that act became by that act adverse as against tenants in common, who were not in possession. (*O'Sullivan v. M'Swiney*, 1 Longfield & T. 118, 119.) Where a tenant in common had been in exclusive possession of the rents of S. for more than twenty years, and an ejectment had been brought by another co-tenant in common, to which A. had taken defence, and on which no further

How tenants
in common,
&c. were
affected by
old statutes of
limitation.

proceedings were had, taking such defence is not conclusive evidence of adverse possession against A.'s co-tenant in common. (*O'Sullivan v. M'Swiney*, 1 Longfield & T. 111.)

Coparceners, joint tenants, and tenants in common, having a joint possession and occupation of the whole estate, it was a settled rule of law that the possession of any one of them was the possession of the others or other of them, so as to prevent the statutes of limitation from affecting them; nor did the bare receipt of all the rents and profits by one operate as an ouster of the other. (Co. Litt. 243, b. n. (1), 373, b.; *Ford v. Grey*, 1 Salk. 285; 6 Mod. 44; Br. Coparceners; 1 Moore, 868.) The possession of one coparcener was that of the other, so as to create a seisin in the other, and carry her share by descent to her heirs, although the other had never actually entered; (*Doe v. Keen*, 7 T. R. 386;) and entry by one coparcener, when not adverse to her companions, ensured to the benefit of all. (Co. Litt. 243, b.; *Doe v. Pearson*, 6 East, 173; Smith, 295.) But the possession of one heir in gavelkind was held not to be that of the other, where he entered with an adverse intent to oust the other. (*Davenport v. Tyrrel*, 1 Bl. R. 675.)

One coparcener, joint tenant, or tenant in common, could never be disseised by his companion, except by an actual ouster; (Co. Litt. 374, a;) as if one coparcener entered into and made a feoffment of the whole estate, this divested the freehold in law out of the other coparcener. (Co. Litt. 243, b; 374, a.) Disputes frequently arose as to how far the possession of one tenant in common was to be considered as that of the other, and what acts of one amounted to an actual ouster of his companion. Actual ouster did not necessarily mean an act accompanied by real force, and a turning out by the shoulders. A man might come in by a rightful possession, and yet his holding might, under circumstances, become equivalent to an actual ouster. In the case of tenants in common, the possession of one as tenant in common never barred his companion, because it was not adverse, but in support of their common title, and payment of his share of the rent acknowledged him to be co-tenant, and a mere refusal to pay was not of itself sufficient to bar the title of the other. But if upon demand of payment by one tenant, the other not only refused to pay, but denied the title and claimed the whole, and continued in possession, it was considered an ouster. An undisturbed possession for forty years by one tenant in common, where there was no evidence of any account having been demanded, or of any payment of rent, or of any claim by the lessors of the plaintiff, or of any acknowledgment of title in them, or in those under whom they claimed, was held sufficient ground for a jury to presume an actual ouster. (*Doe v. Prosser*, Cowp. 217.) So where one tenant in common in possession claimed the whole, and denied possession to the other, it was held evidence of an ouster of his companion.

(*Doe d. Holdings v. Bird*, 11 East, 49. See *Doe d. White v. Clif*, 1 Camp. 173.) But the bare receipt of rent for twenty-six years by one tenant in common, without accounting for it to the other, was held no evidence of ouster. (*Fairclais v. Shackleton*, 5 Burr. 2604.) Where there were two joint tenants of a lease for years, and one required the other to quit the house, and he did so, this was held to be an actual ouster. (*Beverley's case*, Clayt. 3; but see *Anon.* Ibid. 121, contrd, Vin. Abr. Joint-tenants. (P. a.)) Where houses had been pulled down by a railway company, and a railway constructed on the site of them, this was held such an occupation as amounted to an actual ouster of a tenant in common of the premises. (*Doe d. Wason v. Horn*, 5 Mees. & W. 564; 3 Id. 333.) Where a testator devised an estate to his brother and sister for their lives and the life of the survivor, and after their decease to John H., E. C., and S. H., (their children) as tenants in common in fee; the survivor of the devisees for life died in 1777, and S. H., one of the devisees in remainder, continued afterwards to reside on the premises devised. John H., another of the devisees in remainder, died in Nov. 1790, having devised his freehold estates to his wife for life, and after her decease to his three daughters. By indentures made in the years 1791 and 1792, James H., described as heir at law of John H. his brother, deceased, and the two other devisees in remainder named in the will of the original testator covenanted to levy a fine of the devised premises, to ensure to the use of such persons as they should appoint; and afterwards by indenture reciting that a fine had been levied, appointed the premises to P. in fee, who in 1792 entered thereupon, and continued from thenceforth in undisturbed possession of the whole. It was held, in an ejectment brought against P. by the heir at law of one of John H.'s daughters, (which daughter, on the death of her mother, the tenant for life under the will of John H., was under coverture,) that the deeds of 1791 and 1792, under which P. claimed, were, as against him, evidence of the seisin of John H. at the time of making his will and of his death; and that, independently of these deeds, the seisin of S. H. the co-tenant in common, being the seisin of John H. there was no ground for presuming an ouster of John H. (*Doe d. Thorn v. Phillips*, 3 B. & Ad. 753.)

Where one tenant in common levied a fine of the whole estate, and received the rents for nearly five years afterwards without account, it was held not sufficient to warrant a direction to the jury, against the justice of the case, to find an actual ouster of the companion, so as to require an actual entry to avoid the fine. (*Peaseable d. Hornblower v. Read*, 1 East, 568.) So an actual entry was not required by one tenant in common to avoid a fine levied by the other of the reversion of the whole estate, as there could be no actual ouster of the reversion. (*Doe v. Elliot*, 1 B. & Ald. 85.)

Ejectment by
one tenant in
common.

At the common law, generally speaking, one tenant in common cannot maintain an ejectment against another tenant in common, because the possession of one tenant in common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But where the claimant tenant in common has not been in the participation of the rents and profit for a considerable length of time, and other circumstance concur, the judge will direct the jury to take into consideration whether they will presume that there has been ouster: as to which see the cases of *Doe dem. Fisher v. Prosser*, 1 Cowp 217; *Doe dem. Hellings v. Bird*, 11 East, 49; and *Doe dem. White v. Cuff*, 1 Campb. 173. And if the jury find an ouster then the right of the lessor of the plaintiff to an undivided share will be decided exactly in the same way as if he has brought his ejectment for an entirety. And so also if the consent rule admits an ouster as well as the lease to, and entry of the nominal plaintiff, this admission in the consent rule will prevent the defendant from setting up that he is tenant in common with the lessor of the plaintiff; and then also the title of the lessor of the plaintiff to enter will alone be to be decided. (*Cullen v. Doe d. Taylerson*, 11 Ad. & Ell. 1014, 1015; 3 P. & Dav. 539.) In ejectment by one tenant in common against another, it is necessary either to prove an actual ouster, or to produce the consent rule to confess lease, entry and ouster. (*Doe d. White v. Cuff*, 1 Campb. 173. See 3 P. & Dav. 548.) In ejectment by one tenant in common against his companion, the defendant will be allowed (since the stat. 3 & 4 Wm. 4, c. 27, s. 12,) to enter into the limited consent rule to confess lease, entry and ouster of the nominal plaintiff, in case an actual ouster of plaintiff's lessor should be proved at the trial, but not otherwise. (*Doe d. Richardson v. Roe*, 2 Jurist, 1090.)

There can be no ouster between tenants in common in possession; and therefore if one takes more than his share of the rents, the only remedy is account, either by action under the stat. 4 Anne, c. 16, s. 27, or by bill in equity. (*Denys v. Shuckburgh*, 4 Y. & Coll. 42. See *Wheeler v. Horn*, Willes, 209; *Walker v. Holyday*, Com. R. 272.) A joint demise in ejectment cannot be supported as the several demise of one or more of the lessors whose title is proved at the trial; therefore where the demise was by one parcener jointly with another parcener, and her husband, whose title *jure uxoris* was barred by fine and non-claim, there cannot be a verdict for the other plaintiff. (*Doe d. Blight v. Pett*, 11 Ad. & Ell. 842.)

The confession of ouster in the consent rule, being sufficient proof of actual ouster in an ejectment by one tenant in common, &c. against another, (*Oates d. Wigfall v. Brydon*, 3 Burr. 1895; *Doe d. White v. Cuffs*, 1 Camp. 173,) it was usual in such cases to enter into a special rule confessing lease and entry only, which may be done upon the defendant's showing by

affidavit that he was tenant in common with the lessor of the plaintiff, and denying actual ouster. (*Doe d. Gigner v. Roe*, 1 Tunt. 397. See Tidd's Pr. 647; Roscoe on Real Actions, 574; Bagley's New Pr. 482—514; stat. 1 & 2 Vict. c. 74, substituting for the proceeding by ejectment a summary mode of recovering possession of tenements held without rent, or at a rent under the rate of £20.)

POSSESSION OF YOUNGER BROTHER, &c.

XIII. And be it further enacted, that when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir. (b)

(b) If a man, seised of certain land in fee, had issue two sons, and died seised of such land, and the younger son entered the land, and the elder son entered the land, the statute of limitations did not operate against the elder son, as the law intended that he entered claiming as heir to his father, being the same title as that by which the elder son claimed. (*Litt. s. 396; Sharlington v. Seaton*, Plowd. 306.) On proof that the sister of the plaintiff occupied the estate for twenty years, and that the defendant entered as her heir, her possession would be construed to be by *curtesy* and license, to preserve the possession of the brother, and therefore not within the intent of the statute 21 Jac. 1, c. 16. The presumption ceased if it appeared that the brother had been in the actual possession, and that he had been ousted by the sister. (*Page v. Selfby*, Bull. N. P. 102; 2 Stark. on Ev. 290, 2d ed.; Co. Litt. 242; Plowd. 298, 306.) In a late case, where it appeared that on the 3rd of April, 1800, L. D. died seised in fee of lands, and immediately on his death his second son entered into possession of them, being the devisee of such lands named in the will of his father, which was only attested by two witnesses. On the 7th of December, 1805, the second son mortgaged those lands, and in the mortgage described himself as executor, heir at law, and devisee of his father. In 1823, the second son died, and on an ejectment by the heir of the eldest son of L. D., it was held that he was not barred by the statute of limitations, there being no ground to presume an actual ouster by the second son. For the motive of the younger brother in entering was not a matter of consideration, and the circumstance of there being a will not attended so as to pass real estate could not, as to that question,

make any difference; for the entry was still nothing but an entry without title, such a will being in fact no will of land. If the mortgage had been by feoffment, it would have amounted to an ouster or disseisin; not being so, it could only be considered as affording some ground for the presumption of an ouster; a question which it was unnecessary to decide, inasmuch as twenty years had not elapsed since the execution of the mortgage. (*Lessee of Dowdall v. Bryne, Batty's Ir. R. 373.*)

WRITTEN ACKNOWLEDGMENT OF TITLE.

Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent.

XIV. Provided always, and be it further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt, of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom, or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given. (c)

What is an acknowledgment.

(c) Whether a writing amounts to an acknowledgment of title within this section is a question for the judge, and not for the jury to decide. (*Doe d. Carson v. Edmonds*, 6 Mees. & W. 295; *Morrell v. Frith*, 3 M. & W. 402.) A party in possession adversely of land, being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows:—"Although if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent on an agreement for a term of twenty-one years:" the bargain subsequently went off, and no rent was paid or lease executed. It was held that this letter was not an acknowledgment of title

within the 3 & 4 Wm. 4, c. 27, s. 14, because there was no final bargain. (*Doe d Curzon v. Edmunds*, 6 Mees. & W: 295. See *Morrell v. Frith*, 3 Mees. & W. 402.)

A correspondence by a party in possession of property with the solicitor of a society, by which he merely professed to hold the estates until an account on the foot of charges, to which he was entitled, should be closed, and offered to refer to arbitration all questions touching such account, as the only matter in dispute, was held to amount to a written acknowledgment of the plaintiff's title, and save it from being barred. (*Incorporated Society v. Richards*, 1 Connor & Lawson, 86.) A correspondence between parties, the one claiming a right to the property, and the other an incumbrance on it, would not amount to an acknowledgment of title, because there might be an infirmity in the title acknowledged, which would give a third person a title against one or both of them. (*Id.* 86.) The acknowledgment must be in writing, and it may be doubted whether parol evidence of the acknowledgment will be excluded. (*Haydon v. Williams*, 7 Bing. 168; 4 M. & P. 811.)

The requiring an acknowledgment in writing to take a case out of the new statute of limitations, is adopted by analogy to the stat. 9 Geo. 4, c. 14, in this section, and in the 28th, 40th, and 42d sections of this act, and in the 5th section of the 3 & 4 Will. 4, c. 42. It may be proper to remark, that a difference occurs in the language of these sections. Thus, under the 14th section, the acknowledgment is to be given to the party in possession, or *his agent*, signed by the person in possession. By the 28th section, twenty years' possession by a mortgagee will bar the right of redemption, unless an acknowledgment of such right shall have been given to the mortgagor or some person claiming his estate, or to the *agent* of such mortgagor or person, signed by the mortgagee, or the person claiming through him.

Acknowledgments in writing.

By the 40th section, money charged upon land and legacies are to be deemed satisfied at the end of twenty years, unless some part of the principal, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his *agent*, to the person entitled thereto, or his *agent*. By the 42d section, no arrears of rent or interest are to be recovered, but within six years after the same shall have become due, or next after an acknowledgment of the same shall have been given to the person entitled thereto, or his *agent*, signed by the person by whom the same was payable, or his *agent*. The cases as to acknowledgments under the 40th and 42nd sections of this act, and under 9 Geo. 4, c. 14, are collected in the note to the 40th section.

By the 5th section of 3 & 4 Will. 4, c. 42, (limiting the time within which actions on specialties are to be brought,) any acknowledgment, either by writing signed by the party liable by virtue of a specialty, or his *agent*, or part payment or

part satisfaction on account of any principal or interest due thereon, will take a case out of that act.

It will be seen that the acknowledgment required by Lord Tenterden's act, 9 Geo. 4, c. 14, s. 1, is to be made or contained by or in some writing to be signed by the party chargeable thereby. Under this statute, a signature by the agent of the party to be charged, is not sufficient to take a case out of the statute of limitations, 21 Jac. 1, c. 16. (*Hyde v. Johnson*, 3 Scott, 289; 2 Bing. N. C. 778.) This decision, it is conceived, will be applicable to an acknowledgment under the 14th section of 3 & 4 Wm. 4, c. 27, which requires a signature by the person in possession, or in receipt of the profits of land, or of the rent, but not to the cases under the other sections, where a signature is required to be by the party or his agent. (*Lord St John v. Boughton*, 9 Sim. 218.)

TIME OF LIMITATION ENLARGED.

Possession not adverse at passing of Act.

Where possession is not adverse at the time of passing the act, the right shall not be barred until the end of five years afterwards.

XV. Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry, or distress, or bring an action to recover such land or interest, at any time within five years next after the passing of this act. (d)

Cases on construction of this section.

(d) The policy of the act 3 & 4 Will. 4, c. 27, was to make a possession of twenty years confirm a title, subject to certain exceptions. One of those exceptions is, where there has been an acknowledgment in writing according to the 14th section; the other, where the possession, at the time of the passing of the act, was not adverse: and in such cases, it was accordingly considered, that the parties should have five years for the recovery of the land or interest claimed. (2 Brady, Adair & Moore, 95.) This section does not give five additional years to the party claiming, if the possession was adverse to his right at the time of the passing of the act (24th July, 1833.)

Roberts v. Newland, 11 Ad. & Ell. 44; 3 P. & Dav. 128.
See Colley v. Doe d. Taylerson, 3 P. & Dav. 551; *O'Sullivan v. M'Sweeney*, 2 Brady, A. & M. 95, 96.) Adverse possession, within the meaning of the 15th section of the 3 & 4 Will. 4, c. 27, is not an adverse possession for twenty years: it was held, therefore, that a possession for twenty years, without payment of rent or an acknowledgment of title, was sufficient to bar an ejectment brought for the recovery of lands where the possession was adverse at the time of the passing of the act, although such possession had not been adverse for a period of twenty years. (*Lessee of O'Sullivan v. M'Sweeney*, 2 Brady, Adm. & Moore, 89.)

The question as to the fact of an adverse possession, such as would bring a party within this section, must be determined as it would have been if the act had never passed. (*Doe d. Jones v. Williams*, 5 Ad. & Ell. 296.)

This section only applies where the possession was not adverse according to the former state of the law at the time of the passing of the act, that is, July 24, 1833. (*Nepson v. Doe d. Knight*, 2 Mees. & W. 911.) In an ejectment on the title by one coparcenor against the other it was held, that if the possession of the defendant be adverse to the title of the lessor of the plaintiff at the time of the passing of the stat. 3 & 4 Wm. 4, c. 27, though it has not been so for the period of twenty years before, the case is not within the 15th section of the act. Adverse possession, within the meaning of that section, is not adverse possession for the period of twenty years antecedent to the passing of the act. If the possession be adverse at the time of the passing of the act, and it appear that the defendant has not been in the sole and exclusive possession of the lands, without acknowledgment or account, for more than twenty years before the ejectment was brought, the title of the lessor of the plaintiff is barred. (*Lessee of O'Sullivan v. M'Sweeney*, 1 Jones & Carey, 295.)

D. mortgaged land in fee to I., subject to a proviso of cesser upon payment of the money secured upon a day more than twenty years before the passing of the stat. 3 & 4 Wm. 4, c. 27. Within twenty years before the passing of the statute, D. acknowledged that the mortgage money was unpaid. On ejectment brought by the heir of I. within five years after the passing of the statute, the jury found that the mortgage money was unpaid: it was held, that the ejectment was not barred by section 2, D.'s possession not being adverse at the time of passing the statute, and therefore the lessor of the plaintiff had, by section 15, five years from that time to bring the action, though no proof was given that he had ever been in possession, or received rent or interest. (*Doe d. Jones v. Williams*, 5 Ad. & Ell. 291.)

W. being owner in fee of certain lands, I. occupied them for twenty years, and until his own death, which was before W.'s death. After I.'s death, his widow, and afterwards the

defendant, who was eldest son of I., held on till and after the death of W., and until ejectment was brought by W.'s devisee, within five years of the passing of stat. 3 & 4 Wm. 4, c. 27. The jury found that the possession was not adverse to W. : it was held, that the lessor of the plaintiff was not barred by sections 2 and 7, but had five years from the passing of the statute under section 15 ; and that the defendant could not resist the action on the ground that, having had no notice, he still continued tenant at will (*Doe d. Burgess v. Thompson*, 5 Ad. & Ell. 532 ; 1 Nev. & P. 215.) By a marriage settlement, a husband entitled to the moiety of an estate in fee, which moiety originally belonged to his wife : during the coverture, the other moiety descended to the wife, as heiress at law to her brother. The wife afterwards died, in the husband's lifetime, without issue, and the husband, from the time of her death, in April, 1815, till a sale of the estate in November, 1838, remained in uninterrupted possession of the entire property, without making any acknowledgment of the title of any other person : it was held, that this was a case falling within the 15th section of the stat. 3 & 4 Wm. 4, c. 27, and that, notwithstanding the husband's possession of the moiety which descended to the wife might not be adverse, the heir at law of the wife, not having made his claim within five years after the passing of the act, was barred by the statute. (*Ex parte Hasell, in re Manchester Gas Act*, 3 Jur. 1101 ; 3 Y. & Coll. 617.)

Of Disabilities.

Persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, to be allowed ten years from the termination of their disability or death.

XVI. Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry, or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, (e) then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such

disability, or shall have died (which shall have first happened). (f)

(e) See section 19, *post*, p. 181, as to what places are not to be deemed beyond seas.

(f) It will be observed that imprisonment is not a disability under this act. The disability of imprisonment was omitted in this section on the ground that imprisonment, whether under civil or criminal process, is of short and defined duration; and during its continuance, the party has ample means of communication with friends and professional advisers. (1 Real Prop. Rep. 44.) Imprisonment is still a disability under stat. 21 Jac. 1, c. 16.

The stat. 21 Jac. 1, c. 16, s. 2, (10 Car. 1 sess. 2, c. 6, s. 13, *h.*) contained a proviso, that, "if any person having right of entry should be, at the time his right or title first descended, accrued, come, or fallen, within the age of 21 years, feme covert, *non compos mentis*, imprisoned, or beyond seas, then such person and his heir might, notwithstanding the said 20 years had expired, bring his action, or make his entry, as he might have done before that act; so as such person or his heir shall, within ten years next after his and their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same; and at no time after the said ten years." In the construction of that clause, it was held that it only extended to the persons on whom the right first descended, and that when the statute had once begun to run, no subsequent disability, either voluntary or involuntary, would prevent its operation. (*Doe d. Durours v. Jones*, 4 T. R. 310; and see *Sturt v. Mellish*, 2 Atk. 610—614; Str. 556, 1 Wils. 134.) Thus, where a tenant in tail died, with issue in tail, a feme covert, who died under coverture, leaving issue two sons, both infants, the eldest attained twenty-one, and died without issue, leaving his brother under age, who did not prosecute his claim within ten years after he attained twenty-one, nor until more than twenty years had elapsed since the right first descended. He was held to be barred by the statute, on the ground that the time began to run against the eldest son when he attained twenty-one, and no subsequent disability could stop it; therefore, he and his heirs had only ten years from the time he attained twenty-one. (*Cottrell v. Dutton*, 4 Taunt. 826.) When the ancestor, to whom the right first accrued, died under a disability, which suspended the operation of the statute, it was held, that his heir must enter within ten years next after his ancestor's death, provided more than twenty years had elapsed from the time of the commencement of the ancestor's title to the expiration of the ten years. (*Doe d. George v. Jenson*, 6 East, 80.) It was once, indeed, contended, that the meaning of the saving clause was to allow every person at least twenty years after his own title accrued, if there was a continuing disability, from the death

Construction of saving clause in 21 Jac. 1, c. 16.

of the ancestor last seised, and ten years more to the heir of the person dying under a disability, which ten years were in addition to the twenty years allowed by the first clause; but it was justly observed by the court, that if that construction could prevail, there was no calculating how far the statute would be carried, by parents and children dying under age, or continuing under other disabilities in succession, and that the word *death*, in the second clause, meant and referred to the death of the person to whom the right first accrued, and was properly introduced in order to obviate a difficulty which had arisen in the case of *Stowell v. Lord Zouch*, Plowd. 366, upon the construction of the statute of fines, from the omission of that word, and that the statute meant that the heir of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor, to whom the right first accrued during the period of disability, and who died under such disability, notwithstanding the twenty years from the first accruing of the title to the ancestor should have before expired. (*Doe d. George v. Jesson*, 6 East, 80.) Where an estate descended to parcenors, one of whom was under a disability, which continued more than twenty years, and the other did not enter within that period, the disability of the one was held not to preserve the title of the other after the twenty years had elapsed. (*Doe d. Langdon v. Rowlston*, 2 Taunt. 441.)

It was said by Lord Chancellor Hardwicke, that if a man both of non-sane memory and out of the kingdom came into the kingdom and then went out again, his non-sane memory continuing, his privilege as to being out of the kingdom was gone, and his privilege as to non sane memory would cease from the time he returned to his senses. (2 Atk. 610—614.) If a party at the time the cause of action accrues is abroad, the statute does not begin to run until he comes to England; and if he never comes, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. (*Strithorst v. Græme*, 3 Wils. 145.) If a plaintiff be in England when the cause of action accrues, the time of limitation begins to run, and a subsequent departure from the kingdom, and going beyond the seas, will not entitle the plaintiff or his representative to maintain an action after the expiration of the limited time. (*Smith v. Hill*, 1 Wils. 134. See Lord Kenyon's observations, 4 T. R. 311; *Denys Shuckburgh*, 4 Y. & Coll. 47.) So where there are several partners, some of whom are in England at the time the right of action accrues and others beyond the seas, the action must be brought within six years next after the cause of action accrued, notwithstanding the absence of some of the partners beyond the seas. (*Perry and others v. Jackson*, 4 T. R. 516.)

Presumption
of death.

Where a person has not been heard of for many years, the presumption of the duration of life ceases at the end of seven

year, a period which has been fixed from analogy to the statute of highway, (1 Jac. 1, c. 11, s. 2,) and the statute concerning leases determinable on lives. (19 Car. 2, c. 6.) Thus, upon a plea of coverture, where the husband had gone abroad twelve years before, the defendant was called upon to prove that he was alive within the last seven years. (*Hopewell v. De Pienne*, 2 Campb. 113.) Where a tenant for life had not been heard of for fourteen years by a person residing on the estate, it was held to be presumptive evidence of his death. (*Doe v. Deakin*, 4 B. & Ald. 433; see 2 Id. 386.) It was held that where no account could be given of a person within the exception of the statute 21 Jac. 1, c. 16, s. 2, he would be presumed to be dead at the expiration of seven years from the last account of him. (*Doe d. George v. Jenson*, 6 East, 64.) Proof that a person sailed in a ship bound to the West Indies some years ago, which has not since been heard of, is evidence upon which a jury may presume that the individual is dead; but the time of the death, if it become material, must depend upon the particular circumstances of the case. (*Watson v. King*, 1 Stark. N. P. C. 121; *Paterson v. Black*, Park's Ins. 433; 1 Bl. R. 404.) The burthen of proof is on those asserting the death. (*Wilson v. Hodges*, 2 East, 312.)

Though where a party has not been heard of for seven years after going abroad, he will, at the expiration of that time, be presumed to be dead, there is no presumption raised by law as to the time when the death actually took place; but this is a matter concerning which the jury must form their own opinion upon the particular facts of the case. And therefore an ejectment brought by a remainder-man more than twenty, but less than twenty-seven, years since the tenant for life was last heard of, cannot be supported without other evidence from which the jury may infer that the tenant for life was alive within twenty years. (*Doe d. Knight v. Nepean*, 2 Nev. & M. 219; 5 B. & Ad. 86.) In that case it was necessary to show that the ejectment was brought within twenty years of the death of a party, and for that purpose it was insisted, that although after a lapse of seven years after a party was last heard of the law presumes him to be dead, yet that the presumption is that he lives during the whole of that period; but the Court of Exchequer Chamber, on appeal from the Court of King's Bench, affirmed the doctrine there laid down "that where a person goes abroad and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or end of any particular period during those seven years; that if it be important to any person to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was heard of. The presumption of law relates only to the fact of death: the time of death, whenever it is material, must be a subject of distinct proof." (*Nepean v. Doe d.*

Knight, 2 Mees. & W. 894. See *Doe d. Knight v. Nepean*, 5 B. & Ad. 86; 2 Nev. & M. 219; *Rex v. Inh. of Harborne*, 2 Ad. & El. 540; 4 Nev. & M. 341; *Rex v. Twynning*, 2 B. & Ald. 386.) Where it is necessary to a plea of justification, under a lease from tenant for life, that he should be still living, the defendant must aver the continuance of the life, otherwise the plea is bad on general demurrer. (*Dayrell v. Hoare*, 4 Per. & Dav. 114.) A declaration for rent by assignee of a reversion for the life of a third person against assignee of the term, omitted to aver that *cœtui que vis* was living when the rent accrued; it was held that the continuance of the life was not to be implied from the mere deduction of title, and an acknowledgment in the breach that "after the plaintiff became so seised the rent became due and still is in arrear to the plaintiff," and that the declaration was bad on general demurrer. (*Fryer v. Coombs*, 4 Per. & Dav. 120; 11 Ad. & Ell. 403.) In *Webster v. Birchmore*, (13 Ves. 362,) the presumption of death from length of time was held to have relation to the commencement of the period of uncertainty as to the existence of the party when he was proved to have been in a desperate state of health, and was to have returned to his relation in six months. In *Silleik v. Booth*, (1 Y. & Coll. N. C. 117,) a party was presumed to have died at a particular time within the seven years after he had been last heard of, the particular time being the hurricane months, and the party having sailed from *Demerara* before the expiration of such hurricane months. Where a testator died in 1829, leaving a will in favour of his children, one of whom went abroad in 1809, and had not been heard of since 1815. Both before and after the testator's death endeavours were made, by inquiries and advertisements, to ascertain whether such child were living or dead, but without success: it was held, that he must be presumed to have died before the date of the will. (*Rust v. Baker*, 8 Sim. 443.) In establishing a title upon a pedigree, where it may be necessary to throw a branch of the family out of the case, it is sufficient to show that the person has not been heard of for many years, to put the opposite party upon proof that he still exists. What is done on such a trial is no injury to the man or his issue, if he should afterwards appear and claim the estate. (*Rowe v. Hasland*, 1 W. Bl. 404. See *Fitz. N. B.* 196, A. L.) Proof by one of a family, that many years before a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *prima facie* evidence of his death without issue to entitle the next claimant by descent to recover in ejectment. (*Doe d. Banning v. Griffin*, 15 East, 293.) The death of a legatee has been presumed from twenty five years' absence abroad without being heard of. (*Dixon v. Dixon*, 3 Br. C. C. 510.) On a reference to the master to inquire whether a legatee was living or dead, the certificate of the master stating

that the legatee had been abroad twenty-eight years, and not been heard of for twenty-seven years, and his opinion that he died in the life time of the testator, was the foundation of a decree. (*Lee v. Willock*, 6 Ves. 606; Reg. lib. 1791, fol. 315. See also 13 Ves. 362.)

Where two persons die by the same stroke or accident, and there are no special circumstances in evidence from which it can be presumed that one died before the other, the law of England will draw that presumption from general circumstances; such as the comparative health, strength, or age of the parties. (*Silleik v. Booth*, 1 Y. & C. N. C. 121. See *Gen. Stannard's Case*, Fearn's Post. Works, 38; *Rex v. Dr. Hay*, 1 Wm. Bl. 640; Swinburn, part 7, s. 33; *Wright v. Asherwood*, 2 Salk. 593, n; *Hitchcock v. Beardsley*, West's Rep. t. Hardwicke, 445; *Bradshaw v. Toulmin*, 2 Dick. 633; *Mason v. Mason*, 1 Mer. 308; *Taylor v. Diplock*, 2 Phill. 261; *La bonis Setwyn*, 3 Hagg. Ecc. R. 741; *Colvin v. The King's Proctor*, 1 Hagg. Ecc. R. 92.)

It will be observed, that this act provides that no action shall be brought but within forty years after the right first accrued, and that no further time, beyond the twenty or ten years, is allowed for a succession of disabilities.

EXTREME PERIOD OF LIMITATION FIXED.

Forty Years.

XVII. Provided nevertheless, and be it further enacted, that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years, from the time of which he shall have ceased to be under any such disability, or have died, shall not have expired. (g)

But no action, &c. shall be brought beyond forty years after the right of action accrued.

(g) A feme sole seized in fee married, and she and her husband ceased to be in the possession or enjoyment of the Case on construction of this section.

land, and went to reside at a distance from it. They both died at times which were not shown to be within forty years from their ceasing to occupy. The wife's heir at-law brought ejectment against the person in possession within twenty years of the husband's death and within five years of the passing of the statute 3 & 4 Wm. 4, c. 27, but more than forty years after the husband and wife ceased to occupy: it was held that the heir at law was barred by the 17th section of the statute, though it did not appear when or how the defendant came into possession, and though proof was offered that the wife had levied no fine. *Denman, C. J.* said, the fact being clear that within the terms of 3 & 4 Wm. 4, c. 27, s. 3, the plaintiff's mother was dispossessed or discontinued the possession or receipt of the rents above forty years before the action brought, the action was clearly barred by the 17th section of the same statute. Some argument was raised on the question whether the possession was adverse or not, but the terms of that clause are unequivocal, and one of its objects was to avoid the necessity of inquiring into facts of so ancient a date. If the persons actually in possession could be shown to have held under him through whom the plaintiff claims, the possession of the former might be regarded as the possession of the latter, but in this case there was not a single fact from which such an inference could be drawn. On the contrary, the departure of the former possessors to a distance without appearing to have received any rent or made any demand, is the strongest evidence of their intending to abandon at once all occupation and all claim of ownership. And as the title of the plaintiff's ancestor rested on no documents, but was merely evidenced by possession at an early period, that ancestor's entire desertion of the premises for so long a time goes far to show a consciousness that the anterior occupation was without title. It is true that if Mrs. C. was the owner, her husband was tenant by the curtesy, and that their son's right of possession did not accrue till after his father's death; but this furnishes no answer to the positive enactment of limitation in the 17th clause. (*Doe d. Corbyn v. Bramston*, 3 Ad. & Ell. 63; *S. C. nom. Doe d. Corby v. Branson*, 4 Nev. & M. 664.)

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Successive Disabilities.

No further time to be allowed for a succession of disabilities.

XVIII. Provided always, and be it further enacted, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life

without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person. (h)

(h) It is easy to imagine infancy, coverture, lunacy, and absence from beyond the seas, so to follow one another with respect to a particular line of heirs, that by successive disabilities the period of limitation might be indefinitely protracted; the object of this section of the act is, where ten years or more have expired from the time when the right accrued to a party dying under disability, to allow his heir only ten years whether under disability or not. Successive disabilities in the same person had been held to prevent the operation of the statute of limitations, and to give to the heir ten years after the death of his ancestor to enforce his claim by ejectment. Therefore, when A., a minor, having herself been dispossessed of certain lands in 1787, married in 1794, and being a feme covert, attained her full age in 1796, and died in 1827, it was held that an ejectment was well brought by her heir. (*Lessee of Supple v. Raymond*, 1 Hayes Ir. Rep. 6. See 2 Prest. Abstr. 340; *Blanch. Lim.* 21, 22.)

Beyond the Seas.

XIX. And be it further enacted, that no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any islands adjacent to any of them, (being part of the dominions of his Majesty,) shall be deemed to be beyond seas within the meaning of this act. (i)

Scotland, Ireland, and the adjacent islands, not to be deemed beyond seas.

(i) It was held that Dublin, or any place in Ireland, was beyond the sea within the meaning of the statute 21 Jac. 1, c. 16, s. 7. (*Nightingale v. Adams*, Show. 91.) Of course, Scotland was not considered beyond sea. (*King v. Walker*, 1 Bl. Rep. 286.) The 19th section of the stat. 3 & 4 Wm. 4, c. 27, which removes disabilities by reason of residence in Ireland, &c., is applicable to cases of residence in Ireland before

the passing of the statute, if the controversy has not arisen *ti* after the passing of it. (*Ex parte Hasell, in re Manchester Act*, 3 Jur. 1101; 3 Y. & Coll. 617. See *Battersby v. Kirl* 2 Bing. N. C. 603; *Lane v. Bennett*, 1 Mees. & W. 70; *Tyrr* & G. 441; *ante*, p. 174.)

CONCURRENT RIGHTS.

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

XX. And be further enacted, that when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession. (k)

(k) This section of the act is in derogation of the old maxim, borrowed from the civil law, "*quando duo jura concurrunt in una persona æquum est ac si essent in diversis*." (4 Rep. 118; 7 Rep. 2 b, 14 b; Plowd. 368.) Under the statute 21 Jac. 1, c. 16, s. 1, a party might have pursued his right of entry twenty years after it attached, although in the meantime the party might have had a different right, of which he was barred by more than twenty years' adverse enjoyment. Thus when a tenant in tail of lands in ancient demesne demised them by fine in the court of ancient demesne for three lives, and afterwards levied a fine of the reversion in the same court to the use of himself and his heirs, it being agreed that the fines in that court did not bar the estate tail, it was held that the first fine created a discontinuance, and the second did not; and that although the issue in tail did not bring their formodon within twenty years after the death of their ancestor, they were

not barred of their right of entry within twenty years from the determination of the lease for lives. (*Hunt v. Bournes*, 1 Salk. 230; 2 Id. 421; 4 Br. P. C. 66.) See *ante*, s. 5, p. 141.)

ESTATES TAIL.

Where Time has run against Tenant in Tail.

XXI. And be it further enacted, that when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred.

Where tenant in tail is barred, remaindermen whom he might have barred shall not recover.

Where Time has commenced running against Tenant in Tail.

XXII. And be it further enacted, that when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action. (2)

Possession adverse to a tenant in tail shall run on against the remaindermen whom he might have barred.

(1) The twenty years for making an entry did not commence under the stat. 21 Jac. 1, c. 16, until the right accrued. An estate might have been enjoyed for centuries under an adverse possession against a tenant in tail, and afterwards have been recovered by a remainderman; as, for example, where an estate was limited to one in tail, with remainder to another in fee, and the tenant in tail and his issue were barred of their remedy by the statute of limitations; yet as the remainderman's right of entry did not accrue until the failure of the issue of the tenant in tail, which might not have happened for an

immense number of years, the remainder-man might, at any time within twenty years after the failure of the issue in tail, have entered and recovered the estate by ejectment. (*Taylor v. Horde*, 1 Burr. 60; S. C. Cowp. 689; 1 Ken. 143; 5 Br. P. C. 247.)

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Possession under Defective Conveyance by Tenant in Tail.

Where there shall have been possession, under an assurance, by a tenant in tail, which shall not bar the remainder, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.

XXIII. And be it further enacted, that when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be, and be deemed to have been, effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail. (m)

(m) There do not appear to have been any cases decided upon this and the two preceding sections, and the editor does not deem it necessary to anticipate the doubts and difficulties which may arise upon the construction of these sections. (See *Doe d. Curson v. Edmonds*, 6 Mees. & W. 295.) The proposition of the Real Property Commissioners on the subject

if this section was, "That on any alienation by tenant in tail, by any assurance not operating as a complete bar to the estate tail, and all estates, rights, and interests limited to take effect on the determination or in derogation of the estate tail, possession under such assurance shall have the same effect in barring the estate tail, and all estates, rights, and interests, limited to take effect on the determination or in derogation of the estate tail, as if such possession had been adverse to the said estate tail, or to the said estates, rights, or interests." (1 Real Prop. Rep. 79, pl. 15, and see *Id.* p. 46.) Before the passing of this act, when an heir in tail brought an ejectment against a defendant who had been in receipt of the rents of an estate thirty years during the life of the ancestor in tail, and seven years after his death, the ancestor having had seisin, it was held, that such possession of the defendant was no bar to the action, and that the lessor of the plaintiff was not bound to rebut the presumption arising from such possession, by showing that the ancestor had not conveyed by fine and recovery. For though he might have conveyed by fine and recovery, and so have barred the lessor of the plaintiff, he might also have conveyed by lease and release, which would have made a good title against himself only, and would not have barred his son, the next tenant in tail. The court were of opinion that the long possession by the defendants might be referable to such a state of things, and if so, there would have been no adverse possession to the title of the issue in tail, and the son was not barred. (*Doe d. Smith v. Pike*, 3 B. & Ad. 742; S. C. 1 Nev. & Mann. 385.)

BARS IN EQUITY.

Time of Limitation fixed with reference to the Legal Limitation.

XXIV. And be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity. (n)

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

(a) Courts of equity have constantly guided themselves by

this principle, that wherever the legislature has limited a period for proceedings at law, equity will, in analogous cases, consider the equitable rights as bound by the same limitation. (1 P. Wms. 742; 3 Id. 143; Prec. Ch. 518.) Thus in the case of equitable titles to land, equity required relief to be sought within the same period in which an ejectment would lie at law; and in cases of personal claims it also requires relief to be sought within the period prescribed for personal suits at law of a like nature. If therefore the ordinary limitation of such suits at law be six years, courts of equity will follow the same period of limitation. (*Edsell v. Buchanan*, 1 Ves. sen. 83; Com. Dig. Chancery, 1; *Smith v. Clay*, 3 Br. C. C. 639, n.; *Cholmondeley v. Clinton*, 2 Jac. & W. 156; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 629.) Lord Redesdale held that courts of equity acted not merely by analogy, but in obedience to the statute of limitations upon all legal titles and demands, and could not act contrary to their provisions, and that the statute of limitations virtually included courts of equity; for when the legislature limited the proceedings at law in certain cases, and provided no express limitation for proceedings in equity, it must be taken to have contemplated that equity followed the law, and therefore to have virtually enacted in the same cases a limitation in equity. (2 Sch. & Lef. 630, 631; 1 Id. 428.) The stat. 3 & 4 Will. 4, c. 27, was intended to put an end altogether to the discretion of courts of equity in those cases where they had before acted by analogy to the time limited at law. That was an analogy founded both in law and good sense, but it no longer remains in the discretion of the court, but is incorporated in the statute. (1 Y. & Coll. 439, 440.) Those courts also, by their own rules, independently of any statutes of limitation, give great effect to length of time, and refer frequently to those statutes for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity of any particular demand. (17 Ves. 97.)

A court of equity will not grant relief after an adverse possession of twenty years.

It was laid down by Sir T. Plumer (*Cholmondeley v. Clinton*, 2 Jac. & Walk. 175,) as established both in principle and authority, "that the laches and nonclaim of the rightful owner of an equitable estate for a period of twenty years, (supposing it the case of one who must within that period have made his claim in a court of law, had it been a legal estate,) under no disability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the statute of limitations, if, during all that period, the possession has been held under a claim unequivocally adverse, and without any thing having been done or said, directly or indirectly, to recognise the title of such rightful owner by the adverse possessor; and that the operation of the bar in such a case will not be prevented by the mere existence of the legal estate unbarred in a trustee, provided nothing be done or said to admit such legal estate to belong to, or to be held in trust for, the rightful

ower, but on the contrary, the same is uniformly treated as belonging to the claimant in possession, as the sole and exclusive *cestui que trust*, and without any fraud or misconduct, is appropriated to his use and benefit." Thus where a testatrix devised a customary tenement to *John*, without words limiting the inheritance, upon her death the dormant surrenderee, in whom the legal estate was vested, surrendered the fee to *John*, who died more than forty years before the filing of the bill, having surrendered the tenements to a purchaser, who had notice of the above will: it was held, that the equitable title of the heir, which accrued on the death of *John*, was barred, for, from his death, the possession was adverse, and although the defendant was affected with notice of the will, yet the plaintiff ought to have claimed within twenty years, and not having done so, was barred by length of time. (*Collard v. Harvey*, 2 Russ. & M. 675.) Writs of right, or writs of forefeudon, or others of the same nature, were not regarded in equity; but the provision in the statute 21 Jac. 1, c. 16. s. 1, which applied to rights and titles of entry, and in which the period of limitation was twenty years, was there constantly acted upon. (2 Jac. & Walk. 192.) A demurrer was allowed to a bill of discovery in aid of an action of intrusion brought by a remainder-man, claiming under a devise, after a lapse of thirty-nine years from the death of the tenant for life, and twenty-seven years from the time when the remainder-man attained his age of twenty-one years. (*Cuthbert v. Baker*, 4 Bligh, 125.) The exceptions in the statute of limitations were also adopted in equity, by allowing persons under disabilities to prosecute their claims within ten years after their removal. (3 P. Wms. 287, n.; 4 Br. C. C. 441; see 17 Ves. 99; 19 Ves. 184; 2 Mer. 240; Coop. C. C. 161, 189; 19 Ves. 327.) The statute of Westm. 2 (13 Edw. 1, c. 5,) which makes six months a bar in *quare impedit*, is admitted as a bar as well of an equitable as a legal right, the object of the statute being to secure the peace of the church. (*Bateley v. Allington*, 3 Atk. 458, 9.) Where the demand is not of a legal nature, but is purely equitable, or where the bar of the statute is inapplicable, courts of equity have another rule, founded sometimes upon the analogies of the law, where such analogy exists, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands, and not to encourage laches and negligence. (*Sherman v. Sherman*, 2 Vern. R. 576; 1 Eq. Abr. 12; *Bridges v. Mitchell*, Bunb. 217; Gilb. E. R. 217; *Foster v. Hodgson*, 19 Ves. 180, 184; *Sturt v. Mellish*, 2 Atk. 610; *Pomfret v. Lord Windsor*, 2 Ves. 472, 476, 477; *Bond v. Hopkins*, 1 Soh. & Lefr. 428; *Smith v. Clay*, Amb. R. 647; 3 Bro. C. C. 639, n.; *Stackhouse v. Barnston*, 10 Ves. 466, 467; *Beckford v. Wade*, 17 Ves. 96.) Hence, in matters of account, although not barred by the statute of limitations, courts of equity refuse to interfere

after a considerable lapse of time, from considerations of public policy, from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost, and from the consciousness, that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *Vigilantibus, non dormientibus, jura subveniunt*. (1 Fonbl. Eq. pp. 329—334, Jeremy on Eq. Juried. b. 3, pt. 2, ch. 5, pp. 549, 550; 1 Madd. Ch. Pr. 79, 80; *Holtcomb v. Rivers*, 1 Ch. Cases, 127; 1 Fonbl. Eq. b. 1, ch. 4, s. 27, and notes.) Under peculiar circumstances, however, excusing or justifying the delay, courts of equity will not refuse their aid in furtherance of the rights of the party: since, in such cases, there is no pretence to insist on laches or negligence, as a ground for dismissal of the suit. (*Lopdell v. Creagh*, 1 Bligh, N. S. 255.) By an act of parliament establishing a canal company, the committee of the company had power in case any person, who should agree with the company for sale of any commons or waste lands, should not be able to make a good title to the satisfaction of the committee, or in case any person entitled to commons or waste lands to be purchased by the company could not be known, to order the purchase money to be paid into the Court of Chancery. In 1812, a contract for the purchase of certain lands on P. Common was entered into by the company with S., a party whose title to sell was then doubtful; the company, however, took possession of the lands, and never paid the purchase money into court. In 1827, an act passed for the inclosure of P. Common; and in 1837, an award was made pursuant to that act, by which the arbitrator found that S. was the true owner of the lands in question: it was held, that the company were trustees of the purchase money for S., and those claiming under him; and that as the legislature had permitted a bargain with an unascertained person. S. and those under him were guilty of no laches in not filing a bill against the company for the recovery of the purchase money before 1837, the period when the true ownership was ascertained. It is questionable whether any length of time will operate as a bar to the lawful claimant, where a trustee admits that the trust-money has not been paid, but that it has remained for a length of time in his hands. (*Cater v. Croydon Canal Company*, 4 Y. & C. 405.)

Express Trust.

XXV. Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of

In cases of
express trust,
the right shall
not be deemed

the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him. (o)

to have accrued until a conveyance to a purchaser.

(o) In the case of a direct or express trust, as where an estate is conveyed to the use of A. and his heirs in trust for B. and his heirs, no time, as between the trustee and *cestui que trust*, can operate as a bar to the equitable right of the latter, (Bernard. C. R. 449; *Townsend v. Townsend*, 1 Br. C. C. 561. See cases cited 1 Madd. Ch. 565, 3rd ed.) for between him and his trustee there is no adverse possession. Between *cestui que trust* and trustee no lapse of time will preclude the account from the commencement of the trust, in a case in which the relation of trustee and *cestui que trust* continues, the transactions between them are not closed, and the delay of the claim is attributable to the trustee not having given to the *cestui que trust* that information to which he was entitled, and accounted with him in such manner as he ought. (*Wedderburn v. Wedderburn*, 4 M. & Cr. 41; 3 Keen, 722.) But time may be a bar where there has been a direct and independent dealing between the trustees and the *cestui que trust* after the relation has terminated. (*Wedderburn v. Wedderburn*, 2 Keen 749. A suit to make an executor account for a sum of money which had been bequeathed to him by his testator upon certain trusts, and which had been severed by the executor from the testator's personal estate, and the interest of which had, for a time, been applied upon the trusts of the will, is not a suit to recover a legacy within the meaning of the stat. 3 & 4 Wm. 4, c. 27, s. 40. The fund ceased to bear the character of a legacy as soon as it assumed the character of a trust fund. The suit, therefore, was considered not as a suit for a legacy, but as a suit to compel a party to account for a breach of trust, and it is clear, therefore, that it is not within the terms of that act. (*Philippo v. Munings*, 2 M. & Cr. 309.) Where there is no doubt as to the origin and existence of a trust in respect of property, of which, for a long series of years, the trustees have been in the beneficial enjoyment, lapse of time is no bar to the recovery of the property by the *cestui que trust*, but where any doubt exists, and it is possible to reconcile such enjoyment with the facts of the case, the utmost regard is then to be paid to the length of time during which there has been an enjoyment of the property inconsistent with the supposed trust. (*Attorney General*

Time no bar between trustee and *cestui que trust*.

ral v. Fishmongers' Company, 5 Jurist, 693, C.) But the rule that a trust is not barred by length of time applies only as between *cestui que trust* and trustee, and not between *cestui que trust* and trustee on one side, and strangers on the other for that would be to make the statute of no force at all, because there is hardly an estate of consequence without such a trust and so the act would never take place. Therefore, when a *cestui que trust* and his trustee have been both out of possession for the time limited, the party in possession has a good bar against both. (*Per Lord Hardwicke in Llewellyn v Mackworth*, Barnard. C. R. 445; 15 Vin. Abr. 125, n. to pl. 1; and see *Townsend v. Townsend*, 1 Br. C. C. 550; *Clay v. Clay*, 3 Br. C. C. 639, n.; *Ambl. 645*; *Herry v. Ballard*, 4 Br. C. C. 469; *Harwood v. Oglander*, 6 Ves. 199; 8 Ves. 106; *Hovenden v. Lord Annersley*, 2 Sch. & Lef. 629; Sugd. V. & P. 354, 8 ed.) A conveyance of the legal estate by the trustee, or as Lord Hardwicke seems to have thought (1 Ves. sen. 435, 436,) a disseisin or actual ouster of the trustee by the *cestui que trust*, may indeed be presumed from length of possession, or under particular circumstances; but time alone does not destroy the interest of the trustee. Where estates were devised to trustees upon trust to sell and to pay debts, and subject thereto for the testator's infant children, and the surviving trustee retained possession of one of the estates in satisfaction of debts which he alleged himself to have paid, the testator being insolvent; on a bill for an account and conveyance of the estate, by one of the children and the representatives of another child, forty-five years after the testator's death, stating that they had recently discovered the facts, special inquiries were directed to ascertain whether they had any notice of the circumstances; whether they had in any manner released; and whether the trustee had advanced money to the amount of the value of the estate. (*Chalmers v. Bradley*, 1 Jac. & Walk. 51, where numerous cases on this subject are cited.) In one case the purchase of trust property by trustees for their own benefit, was set aside, after a considerable lapse of time and several assignments. (*Attorney-General v. Lord Dudley*, Coop. C. C. 146.) But in another case, a bill to set aside a purchase by a trustee for himself and his children was dismissed, merely on the ground of the lapse of eighteen years. (*Gregory v. Gregory*, Coop. C. C. 201; see *Champion v. Righty*, 1 Russ. & M. 539.)

Possession of
cestui que
trust not ad-
verse to
trustee.

In general the possession of the *cestui que trust* is not adverse against the trustee, unless the former has denied the title of the trustee. In the case of a strict trustee, it is his duty to take care of the interest of his *cestui que trust*, and he is not permitted to do any thing adverse to it; a tenant also has a duty to preserve the interests of his landlord; and many acts therefore of a trustee and a tenant, which if done by a stranger would be acts of adverse possession, will not be so in them, from its being their duty to abstain from them. (*Per Lord Eldon*, 2 Jac. & W. 190.) For where a person has conveyed

a legal estate in land to a trustee for himself for any particular purpose, and continues to hold the possession, he becomes tenant at will to such trustee, and his possession not being adverse to the title of the trustee, the statute of limitations will not operate. Where an estate was conveyed by a tenant for life and remainder-man to the use of trustees in trust to sell it, with the consent of the parties interested, and to invest the purchase-money in other lands to be settled to different uses, with a proviso that till such sale the rents should be received by such persons as would have been entitled thereto under a former settlement, it was held that the possession and receipt of the rents by the tenant for life for above twenty years after the creation of the trust, consistent with the terms of the deed and the object of the trust, without any interference of the trustees, did not show his possession to be adverse to their title, so as to bar their ejectment against his grantees, such possession being consistent with and secured to him by the deed of trust. A presumption of a re-conveyance from trustees is always made in favour of the possession of those who are rightfully entitled to it, and to invest that possession with a legal title; but such a presumption is not warranted where the possession of the party was all along consistent with the deed and the title of the trustees. (*Keene v. Deardon*, 8 East, 248. See *Smith v. Dennison v. King*, 16 East, 283.) Where the possession of a trustee, whose duty was to sell certain estates, and pay off a mortgage and other incumbrances on them, and retain a debt due to himself, and until the sale to keep down the interest on the charges, and pay the surplus over, but who did not sell, but took a transfer of the mortgage, and remained in possession for twenty-two years, during the first ten of which the interest exceeded the rents, was treated as possession as trustee, and therefore not adverse. (*Latter v. Dunwood*, 6 Sim. 462.) So where an estate was vested in trustees, and a married woman who was entitled to an equitable estate for life joined with her husband in conveying the estate to a purchaser by deed and fine for a valuable consideration, it was held that the possession of the purchaser was not adverse against the trustee who had the legal estate, and that the statute did not begin to run until the determination of the life estate. (*Fauson v. Carpenter*, 5 Bligh, N. S. 75; 8 C 1 Dow & Clark, 233.) A fine levied by a trustee could not prejudice the equitable interest of his *cestui que trust*, unless it were levied to a purchaser without notice; (see *Gilb. Ch. 62*; *Bell v. Bell*, 1 Ll. & C. temp. Plunket, 59;) and as *cestui que trust*, entitled to the equitable inheritance, is considered at law merely as tenant at will to his trustee, a fine levied by him did not divest or prejudice the legal estate. (*Earl Pomfret v. Lord Windsor*, 2 Ves. sen. 472, 481; 1 Sand. on Uses, 291, 3d ed.; 5 Cruise Dig. 206-213.)

Where a trustee of a term for the payment of debts purchased the inheritance from the tenant for life, and had it

Constructive trusts.

conveyed to him by fine and feoffment, the circumstance of the purchaser being trustee was held not to entitle the remainder-man to an account of rent, except from his entry to avoid the fine, nor if he neglected to claim for five years did it prevent his being barred. (*Reynolds v. Jones*, 2 Sim. & Stu. 206.)

The following instances of constructive trusts may be mentioned. Where an estate is subject to a trust or equitable interest, and a person purchases it for a valuable consideration with notice of the trust or equitable interest, the estate will be subject to it in the hands of the purchaser. (*Saunders v. Dehes*, 2 Vern. 271; *Langton v. Astrey*, 2 Ch. Rep. 30; *Daniels v. Davison*, 16 Ves 249.) And though a purchaser had not notice before he paid his money, yet if he had notice before the execution of his conveyance, he will be bound. (*Wigg v. Wigg*, 1 Atk. 384; *Tourville v. Naisb*, 3 P. Wms. 307.) So a person acquiring an estate as a mere voluntary grantee, (1 Rep. 121 b; *Pye v. George*, 2 Salk. 680,) or as a devisee, (*Marlow v. Smith*, 2 P. Wms. 200,) will take it subject to every beneficial or equitable lien.

It was settled about six years after the passing of the statute of frauds, (29 Car. 2, c. 3,) that where one man advances the money to purchase an estate, but the purchase is made in the name of another, a trust arises for him who paid the money; such a case forming an exception to the seventh section of that statute which requires all declarations of trust to be in writing. (2 Ventr. 361; *Wray v. Steele*, 2 Ves. & Beames, 390.) Where there is a contract for the purchase of an estate, whether freehold or copyhold, and the purchaser has performed his part of the contract, the vendor, from the time he ought to have conveyed, becomes, by construction of a court of equity, a trustee for the purchaser, that court considering things contracted to be done for valuable consideration as performed. (*Hinton v. Hinton*, 2 Ves. sen. 634.)

The rule that trusts are not within the statute of limitations was held not to apply, where a claim was made after a great length of time against a trustee by implication of law arising upon a doubtful equity. (*Townsend v. Townsend*, 1 Cox, 28.) Though no time bars a direct trust as between *cestui que trust* and trustee, a court of equity will not allow a man to make out a case of constructive trust at any distance of time, for where the length of time would render it extremely difficult to ascertain the true state of the fact, or where the true state of the fact is easily ascertained, and where relief would originally have been given upon the ground of constructive trust, it is refused to a party who after long acquiescence comes into a court of equity to seek that relief. (*Berkford v. Wade*, 17 Ves. 97; *Esparte Hasell*, 3 Y. & Coll. 622; *Bell v. Bell*, 1 Lloyd & G. temp. Plunket, 65; see *Bonny v. Ridgard*, cited 4 Br. C. C. 138.)

Fraud.

XXVI. And be it further enacted, that in every one of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or, with reasonable diligence, might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bona fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed. (p)

In cases of fraud, no time shall run whilst the fraud remains concealed.

(p) Though courts of equity will interpose in order to prevent those mischiefs which would probably result from persons being allowed at any distance of time to disturb the possession of another, or to bring forward stale demands; yet in interference proceeds upon principles of conscience, it will not encourage nor in any manner protect the abuse of confidence, and therefore no length of time will bar a fraud. (1 Fowl. Eq. 331; *Cotterill v. Purchase*, Forrest. 61; *Alden v. Gregory*, 2 Eden, R. 230; *Whalley v. Whalley*, 1 Mer. 406; 8 C. 3 Bligh, 1. As to length of time being no bar in cases of fraud, see also *Deloraine v. Browne*, 3 Br. C. C. 60; *Smith v. Clay*, Id. 639, n.; *Hervey v. Dinwoody*, 4 Br. C. C. 268; 2 Ves. jun. 87; *Yate v. Mosley*, 5 Ves. 480; *Mack v. Atwood*, 5 Ves. 845; *Purcell v. Macnamara*, 14 Ves. 61; *Beckford v. Wade*, 17 Ves. 87; *Hovendon v. Lord Anson*, 2 Sch. & Lef. 607, 630; *Moor v. Blake*, 1 Ball & B. 61; *Medlicott v. O'Donnell*, Id. 156; *Gould v. Okenden*, 4 Br. P. C. 198, Toml. ed.; *Morse v. Royal*, 12 Ves. 355; *Pickering v. Lord Stamford*, 2 Ves. jun. 272; *Byrne v. Freres*, 2 Hall, 176; *Hatch v. Hatch*, 9 Ves. 292.) An agreement on settlement of family disputes, where one party had been guilty of gross fraud and concealment of the rights of the other, was set aside after a great length of time. (*Gordon v. Gordon*, 3 Grant. 400.)

A court of equity will not impeach a transaction on the ground of fraud, where the fact of the alleged fraud had been within the knowledge of the party many years; but held that every new right of action in equity which accrued to the party must be acted on at the utmost within twenty years, except in the case of a trustee whose possession was consistent with the title of the claimant. (2 Sch. & Lef. 637.) Where a party is to be constituted a trustee by the decree of a court of equity, founded on fraud or the like, his possession is adverse, and the statute of limitations will run from the time the circumstances of the fraud were discovered. (2 Sch. & Lef. 633; 2 Ball & B. 129; *Brooksbank v. Smith*, 2 Y. & Coll. 58.) Thus where the facts constituting the fraud had been in the knowledge of the party, and he had laid by for twenty-five years, relief was refused. (*Blennerhasset v. Day*, 2 Ball & B. 118.) But a party who had received money under a misapprehension of his rights was held not bound by it, as in the case of a contract for a disputed title, or the compromise of a litigated right. (Id. 128.) The filing a bill within twenty years, although there has been some delay in prosecuting it, prevents time operating as a bar. (Cas. temp. Talbot, 63.)

When equity will prevent statute of limitations being used as bar.

Where by the interposition of a court of equity to prevent an act rightfully or wrongfully intended, the defendant has lost a remedy at law, a court of equity will give him a remedy equivalent to that from which the interposition of such court has debarred him. Thus where the statute of limitations has run pending an injunction, the court will restrain a debtor from taking advantage of the statute. (*Anon.* 2 Cas. Ch. 217; *Brown v. Newall*, 2 M. & Cr. 572.) And a court of equity will supply a defect in any title which has been prejudiced by an order of the court. If for instance an injunction has been continued so long as to deprive a party of his legal remedy, who has a clear right to recover at law, a court of equity would restrain the party who obtained the injunction from pleading the statute of limitations. (*Fyson v. Pole*, 3 Y. & Coll. 273.) So equity will give interest on the arrears of an annuity, (*Morgan v. Morgan*, 2 Dick. 643; see *Grant v. Grant*, 3 Sim. 340, see p. 364; 3 Russ. 598, and see p. 607,) where the annuitant, with a term of years and a power of entry and distress, had by means of the injunction been prevented from proceeding with an action of ejectment, which had been commenced for recovery of such arrears. So a party who has been restrained in equity from proceeding at law, while the debt was under the penalty of the bond, will be entitled to the principal and interest beyond the penalty. (*Duval v. Terry*, Shaw, P. C. 15, cited in *Grant v. Grant*, 3 Russ. 607; see *O'Donel v. Browns*, 1 Ball & B. 262.) Where a party applies to a court of equity and carries on an unfounded litigation, protracted under circumstances, and for a length of time, which deprives his adversary of his legal rights, a court of equity will supply and administer within its

jurisdiction, a substitute for that legal right, of which the party to prosecuting an unfounded claim has deprived his adversary. (*Pultney v. Warren*, 6 Ves. 73; *The East India Company v. Cawston*, 11 Bligh, 158, 186, 187; see *Furnival v. Hyde*, 4 Russ. 142; *Morgan v. Morgan*, 2 Dick. 643; *Grant v. Grant*, 3 Sim. 863; *Sirdefield v. Price*, 2 Y. & C. 73; *Dun v. Newall*, 2 M. & Cr. 572, 573.)

Acquiescence.

XXVII. Provided always, and be it further enacted, that nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act. (g)

Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

(g) *Acquiescence* may have the same effect as an original agreement, and may bar the right of the party to relief in equity. But to fix acquiescence upon a party, it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded, and to which it refers. The doctrine of acquiescence does not apply where all the parties are under the influence of a common mistake. (2 Mac. 302.) In the case of a trustee's purchasing the trust property, the question of acquiescence cannot arise until it is previously ascertained that the *cestui que trust* knew that his trustee had become the purchaser, for while the *cestui que trust* continues ignorant of that fact, there can be no *laches* in not quarrelling with the sale upon that ground. (*Randall v. Erington*, 10 Ves. 427, 428; *Morris v. Royal*, 12 Ves. 335.) Lord Chancellor Eldon said, "It is established by all the cases, that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust, and either concurrence in the act, or acquiescence without original concurrence, will release the trustees; but that is only a general rule, and the court must inquire into the circumstances which induced concurrence or acquiescence; recollecting in the conduct of that inquiry, how important it is on the one hand to secure the property of the *cestui que trust*, and on the other not to deter men from undertaking trusts." (3 Barnet. 64.) All *cestui que trust*, who (being of age, and under no incapacity,) have had full information of the conduct of their trustees, which was liable to objection, and openly or tacitly acquiesced in it during a considerable time,

When acquiescence bars relief in equity.

are held to have authorised or adopted such conduct, and precluded themselves from all remedy in that respect. (*Brice v. Stokes*, 11 Ves. 319; *Walker v. Symonds*, 3 Swanst. 64; *Ryder v. Bickerton*, Id. 83, n.; *Underwood v. Stevens*, 1 Mer. 712; *Trafford v. Boehm*, 3 Atk. 444.) Every presumption that can be fairly made will be raised against a stale demand. It may arise from the acts of the parties, or the very forbearance to make the demand affords a presumption either that the claimant is conscious it is satisfied, or intended to relinquish it. (*Pickering v. Lord Stamford*, 2 Ves. jun. 683.)

Acquiescence for nearly fifty years in a mortgage transaction, liable to have been impeached, was held a bar to relief. (*Hicks v. Cooke*, 4 Dow, 17.) Long acquiescence by a party acquainted with the facts is a bar to equitable relief for setting aside a lease, upon the ground of fraud or mistake, although it might have been otherwise if the parties interested had questioned the lease recently after the transaction. (*Selsby v. Rhodes*, 2 Sim. & Stu. 41; S. C. 1 Bligh, N. S. 1.) An heir at law has also been held not entitled to an issue *deviseit vel non* after twenty years' acquiescence in his ancestor's will. (*Tucker and others v. Sanger*, M'Clel. 424; S. C. 13 Price, 119.) A wife was held to be bound by the declaration of her husband alone, of the uses of a fine levied of her lands after having acquiesced fifteen years from his death. (*Swanston v. Raven*, 3 Atk. 105.) Where the shareholders of a canal had acquiesced for forty-seven years in an agreement for letting tolls not warranted by an act of parliament, it was held that it was not competent for the shareholders to impeach such agreement in respect of the public interest. (*Gray v. Chaplin*, 2 Russ. 126.) Acquiescence will not be held to have taken place, so long as the same circumstances of undue influence on one side, and distress on the other, in which the oppression commenced, continue to operate. (*Purcell v. Macnamara*, 14 Ves. 106, 121, 122.) Where executors took upon themselves to distribute the personal property of a testator, in thirds, without consulting a legatee, and the shares were paid without her authority, upon her supposition that their construction of the will was right, it was held that the legatee was not precluded from relief on the discovery of the mistake of the executors. (*Newton v. Ayscough*, 19 Ves. 539; *Brookbank v. Smith*, 2 Y. & Coll. 58.)

MORTGAGOR AND MORTGAGEE.

Time of Limitation fixed—Twenty years.

Mortgagor to be barred at the end of twenty years from the time

XXVIII. And be it further enacted, that when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of

any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him: and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage-money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and

when the mortgagee took possession, or from the last written acknowledgment.

• *Legal mortgage.*

not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage-money which shall bear the same proportion to the whole of the mortgage-money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage. (r)

(r) Doubts were entertained whether a mortgagee, who was not proved to have been in possession or receipt of the profits within twenty years, and to whom no acknowledgment in writing had been given according to the 14th section, (*ante*, p. 170,) was not barred of his ejectment by the 2d and 3d sections, inasmuch as the mortgagee's right had accrued more than twenty years previously. (*Doe d. Jones v. Williams*, 5 Ad. & Ell. 291.) These doubts have been removed.

3 & 4 W. 4,
c. 27.

Mortgagees within the definition in 3 & 4 W. 4, c. 27, s. 1, may bring actions to recover land within 20 years after last payment of principal or interest.

By stat. 7 Wm. 4 and 1 Vict. c. 28, reciting that, "doubts have been entertained as to the effect of a certain act of parliament made in the third and fourth years of his late Majesty King *William* the Fourth, intituled 'An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto,' so far as the same relates to mortgages; and it is expedient that such doubts should be removed:" it is declared and enacted, "that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, any thing in the said act notwithstanding."

Cases on construction of 28 mortgagor, &c.

Where the mortgage deed contains no provision that the mortgagor may enjoy the land in the interval between the

execution of the deed and default in payment of the mortgage money, the mortgagee has an immediate right of entry upon the execution of the deed, and an ejectment must be brought within twenty years afterwards if no interest has been paid. W. R. seized in fee of land, by indentures of lease and release, bearing date respectively the 2d and 3d days of September, 1819, and executed by himself only, conveyed the same to I. R. in fee, with the proviso, that on payment by him to I. R. of 200*l.*, with interest, on the 25th March, 1830, the mortgagee, his heirs and assigns, should reconvey the mortgaged premises to the mortgagor, his heirs and assigns. The deed then contained a covenant, that in the event of default being made in payment of the above sum or any part thereof, it should be lawful for the mortgagee, his heirs and assigns, from time to time and all times after such default, peaceably and quietly to enter into and enjoy the said premises, and also a covenant by the mortgagor for further assurance in case of such default. It was held, that the mortgagee had the right of possession under this deed, from the time of its execution, and not merely from the 25th March, 1830, and therefore that an ejectment for the recovery of the premises brought by the heir at law of the mortgagee, within twenty years of the latter but not of the former date, (no interest having been paid on the mortgage, nor any other act recognizing the title of the mortgagee done for twenty years from that date), was too late. (*See d. Royle v. Lightfoot*, 8 Mee. & W. 553; 5 Jurist, 966. *See Wilkinson v. Hall*, 4 Scott, 301; 3 Bing. N. C. 598; *Fisher v. Giles*, 5 Bing. 421; 2 M. & P. 741; *Shep. Touch.* 272, 8th edit.; *ante*, p. 154.)

In *Saule v. Colt*, 1 Y. & Coll. N. S. 36, a question was raised but not determined with reference to the right of the grantee of an annuity charged on land to take proceedings to recover his annuity, after twenty years' possession and receipt of the rents and profits by the grantor punctual payment of the annuity, and no acknowledgment in writing of the grantee's title. It was contended that the grantee, never having been in possession or receipt of the profits of the land, and consequently never having been dispossessed, the time must be considered to have run against him from 1810 (when the annuity was granted) by virtue of the 3d section. In support of this construction, *Dearman v. Wyche*, 9 Sim. 570, was cited, and it was said, that although the stat. 7 Wm. 4, & 1 Vict. c. 28, withdrew mortgages from that construction, yet it applies to that species of incumbrance only.

A. B. C. and D. being tenants for life, under the will of their father E., of certain premises held for lives renewable for ever, with remainder respectively to their sons in tail, in the year 1790 entered into an agreement with M. to convey to him the said premises for the sum of 133*l.*, and which sum was to be applied in payment of a mortgage created by E., the testator, and likewise some judgment debts of his, affecting the

said premises, and inasmuch as a good title could not be otherwise made out, a bill was to be filed for a sale, and M. was to become the purchaser at the above price. This agreement was executed and a bill filed in pursuance thereof, but the bill was never proceeded with, nor did the contemplated sale under it take place. After the execution of the agreement, M., having paid off the mortgage and the judgment debts, amounting in all to the sum of 1301*l.* 10*s.* 3*d.*, and got them assigned to his brother N. as a trustee for himself, entered into the possession of the said premises and so continued to the period of his death, previous to which he made his will, under which N. became entitled to the premises, and continued in possession thereof until his death in 1829, whereupon his daughters, to whom he devised his interest in those premises, entered, and were in possession at the time the bill was filed, thus constituting in M. and those claiming under him, an uninterrupted possession for nearly fifty years. A. and B. having died, each leaving a son, which sons were consequently tenants in tail of the premises in question under the will of their grandfather E., on a bill filed by these two sons as such devisees in tail in the lifetime of the other tenants for life, C. and D., and without making them parties, praying an account of the sum due on the foot of the advances by M., and for liberty to redeem it, it was held that the plaintiffs were within the very terms of, and consequently bound by, the 28th section of the stat. 3 & 4 Wm. 4, c. 27. (*Browne v. Bishop of Cork*, 1 Drury & Walsh, 700. See *Raffety v. King*, 1 Keen, 601; *post*, p. 204, 205.)

Where a mortgagee, who had not been in receipt of the rents and profits of the mortgaged premises for upwards of twenty years, nor received an acknowledgment as required by the 3 & 4 Wm. 4, c. 27, nor had even known of his rights until informed thereof by a pious creditor, was brought before the court by that creditor by an amendment made in 1837 by a supplemental bill to a bill filed in 1833, for the purpose of completing the title to a purchaser so as to have distributed among the creditors of the estate certain funds, which had been impounded to indemnify the purchaser against an outstanding and apparently unsatisfied charge, of which the said mortgage formed a moiety: it was held, that the mortgagee's claim was not barred by 3 & 4 Wm. 4, c. 27, which was held to be inapplicable, as the mortgagee did not come in the character of plaintiff, but as defendant, in a suit instituted prior to the passing of that statute. (*Murphy v. Sterne*, 1 Drury & W. 236.)

A husband separated from his wife becoming mortgagee in possession of her separate estate for twenty years cannot set up the statute of limitations. (*Booth v. Purser*, 1 Haig, H. & S. Ir. Eq. R. 33.)

An acknowledgment which had been given by the mortgagee in possession to the grandfather of the infant mortgagor, though the grandfather was not authorised to act as the agent of the mortgagor, was held to be an acknowledgment within

the 28th section of 3 & 4 Wm. 4, c. 27. (*Trulock v. Robly*, 5 Jurist, 1101.)

It was perfectly well settled before the stat. 3 & 4 Wm. 4, Prior state of c. 27, that twenty years' possession by a mortgagee was *prima facie* the law.

facie a bar to the right of redemption, and it was incumbent upon the mortgagor to show some circumstances for preventing possession for that period from producing such effect. The rule applied, notwithstanding a clear title to redemption in the one party, and on the other side a continued misapplication of the rents and profits committed to his care, contrary to his engagement, and a continued breach of duty from the beginning to the end of the period in omitting to keep and render an account. (2 Jac. & Walk. 188; see Jac. Rep. 513; *Pimm v. Goodwin*, 4 Bligh O. S. 133; *Foster v. Blake*, Id. 140.) In short, a mortgagee was considered as *quasi* a trustee for just 19 years, 364 days, and 12 hours, short by 5 minutes. (Per *Lord Eldon*, 4 Bligh O. S. 71.) Before the stat. 3 & 4 Wm. 4, c. 27, a court of equity acted with equitable rights by analogy to the statute of limitations in the cases of ejectment, and held that twenty years' possession by a mortgagee, under certain circumstances, was equivalent to twenty years' adverse possession at law. There is, however, this material difference between adverse possession at law and the possession of the mortgagee; adverse possession at law is inconsistent with the title of the true owner, but the possession of the mortgagee is consistent with the equitable title of the mortgagor; twenty years' adverse possession gives therefore absolute title to the mortgagee at law, but twenty years' possession of the mortgagee does not in itself give title against the mortgagor. If for twenty years the mortgagor has suffered the mortgagee to hold as if he were the true owner, without acknowledgment of the mortgage title, and if for twenty years the mortgagee has considered himself as the true owner and kept no accounts as mortgagee, a court of equity holds that this negligence of the mortgagor shall protect the mortgagee from the difficulty which, in such circumstances, would attend the mortgage account; but if within the twenty years the mortgagee has acknowledged the mortgage title, a court of equity imputes no negligence to the mortgagor; or if within twenty years the mortgagee has kept accounts, or otherwise dealt with the property as mortgagee, he is not protected from the account in respect of the mortgagor's negligence. (*Hodde v. Healey*, 6 Madd. 181; 8 C. 1 Ves. & B. 536.)

Before the stat. 3 & 4 Wm. 4, c. 27, s. 28, the acknowledgment by the mortgagee of the subsistence of the mortgage with a third party was sufficient to preserve the mortgagor's right to redeem. But by that act the acknowledgment must be given to the mortgagor or some person claiming his estate, or his agent, signed by the mortgagee or person claiming through him. Thus an assignment by the mortgagee alone of his interest, treating it as a mortgage to a third party, (*Smart*

v. Hunt, 4 Ves. 478; *Hardy v. Reeves*, id. 466,) or taking notice by a will, or any other deliberate act reciting that he is mortgagee, (*Ord v. Smith*, Sel. Cas. in Ch. 9; 2 Eq. Cas. Abr. 600; *Perry v. Marston*, 2 Br. C. C. 399;) or an assignment of his interest treated as a mortgage upon the trusts of a settlement, or as a security. (*Hansard v. Hardy*, 18 Ves. 455.) So where the purchaser of an equity of redemption had the legal estate conveyed to him by a deed, dated the 24th of August, 1796, in which it was recited that the purchaser had some time since paid to the mortgagee the money due on his mortgage, and a bill to redeem was filed on the 29th of January, 1816, it was held that the recital was an acknowledgment of the mortgage title till within twenty years from the filing of the bill. (*Price v. Copner*, 1 Sim. & Stu. 347.) So also redemption was allowed after forty years' possession, on evidence of a contract entered into within seven years preceding the filing of the bill by the heir of the mortgagee, for purchase of the equity of redemption. (*Conway v. Shrimpton*, 5 Br. P. C. 187.) And if a mortgagee admit that he has no other title it will be binding, and the mortgagor will be allowed to redeem, although twenty years have elapsed. (*Perry v. Marston*, 2 Br. C. C. 397.) Before the above act, evidence of parol acknowledgments of the mortgage within twenty years was sufficient; (*Rayner v. Oastler*, 6 Madd. 274;) but it must have been clear and unimpeachable; (*Whiting v. White*, 2 Cox, 295; *Perry v. Marston*, 2 Br. C. C. 397, more fully reported in *Whiting v. White*;) and, therefore, in a case where the acknowledgment was proved by only one witness, the bill was dismissed. (*Reeks v. Postlethwaite*, Coop. C. C. 161.) And it seems that the right of redemption was not barred, unless the mortgagee had been in uninterrupted possession for twenty years of the whole of the property comprised in the mortgage, and redemption was decreed where the mortgagee had been eighty years in possession of part only of the property and the mortgagor continued in the possession of the remainder. (*Burke v. Lynch*, 2 Ball & B. 426; *Rakesstraw v. Brower*, Sel. Cas. in Ch. 55.)

Disabilities.

It will be observed, that by the new act, twenty years from the time the mortgagee took possession, or from the last acknowledgment in writing, is made a positive bar to the right of redemption; and as there is no saving in favour of persons under disabilities, it should seem that the owners of an equity of redemption will be barred by twenty years' possession without a written acknowledgment. It may be a question, how far the rules which previously existed as to persons under disabilities (see *Beckford v. Wade*, 17 Ves. 89—93,) will have any application under the new act: it appears, however, to be proper to notice the cases between which there has been some conflict. The rule seems to be, that if the mortgagee enters into possession by virtue of his mortgage title alone, he is for the period of twenty years liable to account and redemption;

but if the mortgagor permits him to hold for twenty years without accounting or admitting his mortgage title, the right of redemption is lost, and then time runs against the mortgagor from the moment the mortgagee took possession, and against all claiming under the mortgagor, whatever may be their disabilities. (*Raffety v. King*, 1 Keen, 601; *Harrison v. Hollins*, 1 Sm. & Sta. 471.)

Where a decree for redemption and an account has been obtained it must be prosecuted within twenty years, otherwise the suit will be barred; and if the time has begun to run against the ancestor it will continue to run on although the parties are infants. (*St. John v. Turner*, 2 Vern. 418.) But redemption of a mortgage was refused, though an account had been obtained within twenty years by a receiver and manager of the estate, because it was without the authority of the mortgagee, who was of unsound mind. (*Barron v. Martin*, Coop. C. C. 189.)

It has been contended, and the doctrine is supported by some cases and dicta, that every person who becomes successively entitled to an equity of redemption, has his twenty years from the time of his right accruing, and is not barred by the laches of his predecessors. (*Pinn v. Goodwin*, cited 2 Mer 309; S. C. 1 High, 133; *Foster v. Blake*, id. 140; S. C. 2 Ball & B. 565; *Adams v. Milne*, 6 Sim. 369, contra.) Where a husband and wife, joined in fee in right of the wife, made a mortgage by lease and afterwards conveyed the equity of redemption by lease and release to the mortgagee, who remained in possession as complete owner for more than twenty years during the life of the husband, tenant by the curtesy, who had conveyed, it was held that the heir of the wife was not barred of his equity of redemption by lapse of time. *Macdonald, C. B.*, in decreeing a redemption in this case, said, "The defendant, standing in the place of the tenant by the curtesy, was bound to keep down the interest of the mortgage. As mortgagee, he was to receive the interest; uniting the two characters, he is to be considered as having supported the different rights, and discharged the duties of each: the same person was to receive and pay. The case does not fall within the general rule." (*Carbutt v. Barker*, 3 Anstr. 755; S. C. 1 Id. 138, contra.) So where, in the year 1757, the husband and wife conveyed by lease an estate belonging to her to a mortgagee in fee, and in 1766 they conveyed, by lease and release only, the equity of redemption to the mortgagee, who had continued in possession between sixty and seventy years, the wife died in 1780, and on a bill filed by persons claiming under the heir of the wife nineteen years after the death of the husband, a plea of the statute of limitations was overruled, but without prejudice to the defendants using the statute of limitations as a defence in their answer. (*Rosald v. Russell*, 1 Younge, 9.) So where husband and wife surrendered her copyholds to the use of a mortgage in fee, and the husband alone released the equity of re-

Possession of mortgagee under informal conveyance by married women.

demption to the mortgagee, who was admitted and continued in possession, on a bill eleven years after the husband's death, by the wife and her children, redemption was decreed, with an account of rents from the husband's death. (*Rosse v. Hicks*, 2 Sim. & Stu. 403.) In general a presumption arises from neither payment of the surplus rents nor delivery of account within twenty years, but the presumption does not take place where the same person is to pay and receive, as in the case of a mortgagee who obtains a conveyance of the equity of redemption from a party having only a limited estate. (*Corbett v. Barker*, 3 Anstr. 759; *Ravald v. Russell*, 1 Younge, 9.) In *Ashton v. Milne*, 6 Sim. 369, a husband seized in right of his wife, and the wife in the year 1784 conveyed the fee, subject to a mortgage term, no fine being levied, nor any act done to bind the wife's right. The wife remained under coverture until 1818; the husband died in 1826, and upon the son and heir filing his bill to redeem his interest in the fee in 1831, it was held that, because the purchaser, who took at the time of his purchase an assignment of the mortgage term to a trustee for his benefit, continued in possession of the estate for more than twenty years, he acquired the interest of the wife and her heir, notwithstanding their disabilities, as well as the interest of the husband, which was all that could possibly pass by the conveyance. In this case no distinction was made between the cases in which the possession of the mortgagee is referred to his mortgage title only, and the cases in which the possession is referred to, and depends upon some other title. It has been since decided, that if the mortgagee entered not as a mortgagee only, but as a purchaser of the equity of redemption, he must look to the title of his vendor, and the validity of the conveyance he takes; and if the conveyance gives him only the estate of a tenant for life, he is bound, having united in himself the characters of mortgagor and mortgagee, to keep down the interest of the mortgage for the benefit of those in remainder, and time will not run against them during the estate for life. An estate was devised (subject to a mortgage to S. M. for 1000 years) to M. D. for life, and after her death to V. R. and his heirs, in trust as soon as might be to sell and invest the proceeds, and to divide the same among the testator's children as they should come of age. M. D. was appointed executrix and residuary legatee. In 1796 V. R. and M. D. executed an absolute conveyance of the mortgaged estate to S. M., in consideration of the mortgage debt, and a further sum; and S. M. entered and continued in possession without accounting. S. M. died in 1832, and the bill was filed by the children of the testator to set aside the sale. The defendant insisted that the sale was made to raise money for payment of the testator's debts, and that if the testator's children were not bound by the sale, still they were barred by length of time. Lord Langdale, M. R., reviewed the cases already cited, and decided that time did not begin to run against the children

When mortgagee holds under another title.

during the life of M. D. His lordship said, "If the mortgagee enters, not in his character or in his right of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor and to the validity of the conveyance he takes; and if the conveyance be such as in law or in equity only gives for his benefit the estate of a tenant for life, he must, as it appears to me, take that estate subject to the duties which are attached to it in the relation which subsists between the tenant for life and the remainder-man. One of those duties is to keep down the interest of the mortgage; and having united in himself the two characters of mortgagor and mortgagee, he must, in the language of Chief Baron Macdonald, (in *Corbett v. Barker*, *ante*, p. 203,) be considered to have supported the rights and discharged the duties of each. The argument on which it is contended that time ought to run against the remainder-man in all cases is, that as the remainder-man may redeem, he ought to be barred if he neglects to do so; and, speaking generally, it is clear that the remainder-man has an interest which, as against the mortgagee, entitles him to redeem. But if the tenant for life procures an assignment of the mortgage, or if the mortgagee purchases the interest of the tenant for life, it is by no means so clear that the remainder-man can, without the consent of the tenant for life, redeem the mortgage vested in him; and the observations of Chief Baron Alexander upon that subject, in the case of *Ravald v. Russell*, 1 Younge, 9, are well worthy of attention. (*Raffety v. King*, 1 Keen, 601.) In *Browne v. Bishop of Cork*, 1 Drury & W. 715, (see *ante*, p. 200,) Lord Plunket said, "If it were necessary for me to pronounce my opinion as to the effect of the case of *Raffety v. King*, 1 Keen, 601, so far as it decided between the conflicting authorities, I should feel it necessary to examine them more particularly. In the latter case, the original title was as mortgagee, who afterwards became the purchaser of the life interest of the equity of redemption, but in *Browne v. Bishop of Cork*, (*ante*, p. 200,) the original dealing clearly was for the purchase of the interest, and the assignment of the mortgage was taken merely as a security to protect that purchase."

Fraudulent sales had been made by the tenant for life; his son died in his life time; the tenancy for life continued to exist for above thirty-five years after these fraudulent sales. On the tenant in remainder becoming entitled, he filed a bill to redeem: it was held by the court below, and affirmed by the House of Lords, that he was not barred by the lapse of time. (*Earl Radon v. Becker*, 3 Clark & Finn. 479; 9 Bligh N. S. 532.)

Where husband and wife, being jointly entitled to an equity of redemption in fee, conveyed it by deed without a fine to the mortgagee, it was held that the surviving wife or her heirs might redeem at any time within twenty years from the husband's death. (*Price v. Copner*, 1 Sim. & Stu. 347.) So the right of redemption was not barred by twenty years' possession where the mortgagor or those claiming under him were under

Disabilities of
owner of
equity of re-
demption.

disabilities, (*Reeks v. Postlethwaite*, Coop. C. C. 169.) who were allowed ten years, within which they might claim after the impediments had been removed. (17 Ves. 99; 19 Ves. 184; 3 P. Wms. 287, n. But see *Rafferty v. King*, 1 Keen, 601.) But the plaintiff seeking redemption after the expiration of twenty years' possession by the mortgagee was required to state on his bill the case of exception taking his case out of the rule. (*Foster v. Hodgson*, 19 Ves. 184.)

A plea by a defendant of forty years' possession of a mortgaged estate, without account or admission of any debt, was allowed, in answer to a bill setting up an old mortgage and stating an account settled, and generally that owing to infancy, coverture, and other disabilities, the plaintiff could not proceed. (*Blewitt v. Thomas*, 2 Ves. jun. 669.)

In one case payment of the principal and interest of a mortgage was decreed, although there had been a tender of payment of the money by the mortgagor to the agent of the mortgagee, and a refusal to accept it, and twenty-four years had elapsed without any demand from the mortgagee. (*Meads v. Earl of Brandon*, 2 Dow, 268.) It seems that a shorter time than twenty years has never been held sufficient to ground a presumption of a surrender of a mortgage term. (*Doe d. Brandon & Smith v. Calvert*, 5 Taunt. 169.) Where a mortgage was made as a collateral security, although the mortgagee was not in possession for twenty years and more, yet payment of interest upon the bond according to the agreement of the parties, though not expressed to be on account of the mortgage, prevented the operation of the statute of limitations. (*Hatcher v. Fiaux*, Lord Raym. 740; *Trask v. White*, 3 Br. C. C. 289.) So where premises were mortgaged in fee, with a proviso for reconveyance, if the principal were not paid on a given day, and in the mean time that the mortgagor should continue in possession; upon special verdict, it was found that the principal was not paid on the day appointed, but that the mortgagor continued in possession; there was no finding of the jury, either that interest had or had not been paid by the mortgagor; it was therefore held that, upon that finding, it must be taken that the occupation was by the permission of the mortgagee, and, consequently, that although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations, as there was no adverse possession. (*Hall v. Doe d. Surtees and another*, 5 Barn. & Ald. 687; S. C. 1 Dowl. & Ry. 340; see *Leman v. Newnham*, 1 Ves. sen. 51, 52.)

Welsh mortgages.

A Welsh mortgage is a conveyance of an estate redeemable at any time on payment of the principal, with an understanding that the profits in the meantime shall be received by the mortgagee without account in satisfaction of interest. (See *Talbot v. Braddy*, 1 Vern. 395; *Lawley v. Hooper*, 3 Atk. 280; *Yates v. Humbley*, 2 Atk. 237.) But it is probable that at the present day a court of equity will decree an account

against the mortgagee of the rents and profits, whether the value was excessive or not beyond the interest, and notwithstanding the agreement that the profits shall be retained in lieu of interest. (*Fulthorpe v. Forster*, 1 Vern. 477; see *Coots on Mortgages*, 207, 212; 5 Jarm. Conveyancing by Sweet, 96, 101.)

A Welsh mortgagee has no remedy to compel redemption or foreclosure, (*Longuet v. Scawen*, 1 Ves. sen. 406,) but if a man be permitted to hold over twenty years after the debt has been fully paid, it seems that the mortgagor would be barred. (*Fennick v. Read*, 1 Mer. 125; 5 B. & Ald. 232; and see 1 Madd. Chanc. 519, n. (x)). Where A., being entitled in fee to a freehold estate in remainder expectant on the decease of B., devised his interest to C. for a term of 500 years, subject to a proviso for redemption on payment of the sum of 1000*l.* and interest, without any time being fixed by the proviso for payment of the money; the deed contained a covenant by A. for payment of the money on demand, and also a covenant that it should be lawful for B. to enter into the property, and to hold and enjoy the same until the payment of the principal money and interest; it was held that the mortgage was in the nature of a Welsh mortgage; and a bill of foreclosure filed by B. against a person to whom A. had conveyed his reversionary interest, was dismissed, but without costs. (*Teulon v. Curtis*, 1 Younge, 616. See *Hartpole v. Walsh*, 5 Br. P. C. 267, Toml. ed.) The grant of annuities during the life of the grantees, in satisfaction of a debt to which the grantor was not to be personally liable, but reserved a power of purchasing the annuities, was held part of the personal estate of the grantee, similar to a Welsh mortgage, (1 Ves. sen. 402.)

The right to an equity of redemption may be acquired by adverse possession; thus, where an estate, subject to a mortgage in fee, was settled with an ultimate limitation to the right heirs of S. R.; and on the determination of the particular estates, A. entered, claiming to be entitled under the limitation, and he, and after his death his son, continued in quiet possession, paying interest on the mortgage for twenty years: it was held that the devisee really entitled under the limitation in the settlement was barred of his right to the equity of redemption by length of adverse possession. (*Cholmondeley v. Clinton*, 2 Jac. & Walk. 1; S. C. 1 Dow, N. S. 299; see *Scott v. Knox*, 1 Longfield & T. 381.)

SPIRITUAL AND ELEEMOSYNARY CORPORATIONS

SOLE.

Time of Limitation fixed.

XXIX. Provided always, and be it further enacted, that it shall be lawful for any archbishop, No lands or rents to be recovered by

ecclesiastical or eleemosynary corporations sole, but within two incumbencies and six years, or sixty years.

bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said thirty-first day of December one thousand eight hundred and thirty-three, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period. (s)

How ecclesiastical persons are affected by stat. of limitations.

(s) Before this act, ecclesiastical corporations, and generally all ecclesiastical persons, seised in right of their churches, were not within any of the other statutes of limitation, and therefore could not bar their successors, by neglecting to bring actions for recovery of their possessions within the time prescribed for other persons, although an ecclesiastical person, who was guilty of such neglect, would himself have been barred. (Plowd. 358, 538; 11 Rep. 78 b.; 1 Roll. R. 151; 2 Bos. & Pull. 546. See 3rd Real Prop. R. 58—62.)

Although the statute of fines, 4 Hen. 7, c. 24, (*ante* p. 128,) did not operate as a bar to the successors of bishops, rectors, or other ecclesiastical persons entitled to lands in respect of offices for life, yet each particular person was bound by a lapse of five years in his own time after the fine had been levied. (*Runcorn v. Doe* d. *Cooper*, 5 B. & C. 696; 8 D. & R. 450; *Croft v. Howel*, Plowd. 358; 1 Prest. Conv. 235; *Magdalen College Case*, 11 Rep. 67.) The act 2 & 3 Wm. 4, c. 71, for shortening the time of prescription in certain cases,

extends to any ecclesiastical person, but tithes are excepted from that act (*ante* p. 2, 5). The statute 2 & 3 Wm. 4, c. 100, has shortened the time required for the valid establishment of claims of a *modus decimandi* or exemption from or discharge of tithes by composition real or otherwise. In the construction of this statute it has been held, that persons claiming an exemption from tithes and relying on that statute, must prove a legal origin of some exemption mentioned in the act, and that the mere nonpayment of tithes for the period prescribed by the act is not sufficient. (*Salkeld v. Johnson*, 6 Jur. 210. See Shelford on the Acts for the Commutation of Tithes, 2nd ed. and supplement thereto, and statutes 3 & 4 Vict. c. 15, 4 & 5 Vict. c. 36.)

ADVOWSONS.

Time of Limitation fixed.

XXX. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years. (t)

No advowson to be recovered but within three incumbencies or sixty years.

(t) By stat. 1 Mary, sess. 2, c. 5, (which was extended to Ireland by stat. 10 Car. 1, st. 2, c. 6,) it was enacted that the statute 32 Hen. 8, c. 2, should not extend to a writ of right of advowson, *quare impedit*, *assize of darrein presentment*, nor *jura patronatus*, but the time of seisin to be alleged in such cases should be as it was at the common law before the making

of the said statute, which was from the time of the commencement of the reign of Rich. 1. Before the statute of Mary if the incumbent of an advowson had lived sixty years and died, and a stranger had presented, the patron could not maintain *quære impedit* or *darrein presentment*. (See Plowd 371 b.; Co. Litt. 115 a.) By the statute 7 Anne, c. 18, (which was held not to be retrospective, 5 Ves. 828,) it was enacted that no usurpation should displace the estate of the patron and that he might present on the next avoidance as if there had not been any usurpation; which provision, in effect, took away all limitations of suits about the right of patronage (See 3 Bl. Comm. 260.)



Lapse.

Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishopricks.

XXXI. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop. (u)

Lapse.

(u) Presentation must be made by a common person within six calendar months after the death of the last incumbent, otherwise the right accrues to the ordinary, which is called a *lapse*. (3 Leon. 46; 2 Inst. 273; Wats. Cl. L. c. 12.) The six months commence from the time the patron has notice of the avoidance; (2 Burn. Eccl. Law, 327;) but if the clerk of a stranger be instituted and inducted, and the patron gives no disturbance within six months, he has no remedy for that turn, because induction is an act of which he is bound to take notice. (Id. 329.) If the avoidance be by resignation or deprivation, the six months do not commence till notice of the avoidance given by the ordinary to the patron. (Com. Dig. Eglise, (H. 9.)) But where the incumbent is himself

then, a sentence of deprivation is not necessary to render the living void, the object of such a sentence being to give notice to the patron. (*Apperley v. Bishop of Hereford*, 3 Moore & Scott, 192; 8 C. 9 Bing. 681.) If the bishop should not present within six months after the lapse to him, then the right is present goes to the archbishop; (Com. Dig. *Eglise*, (H. 11.);) and if neither the bishop nor archbishop present, then is the crown, which is not confined to any time. (Cro. Car. 35; Plowd. 496.) It is clear that, as against the bishop at least, the patron may at any time present, notwithstanding six months have elapsed, provided advantage has not been taken of the lapse. (3 Moore & Scott, 114.) So that if after a lapse and before the bishop or archbishop has collated his clerk, the patron presents one, the latter shall be instituted. (Hutt. 24; Hob. 152, 154; 2 Inst. 273.) So after a lapse to the king, if the patron's clerk be presented, instituted, and inducted, and the incumbent, before the king has taken advantage of the lapse, his right is gone. (Owen, 2—5; Cro. Eliz. 44, 119; 7 Rep. 21.) When an incumbent is made a bishop, the right of presentation to livings held by him vests for that turn in the king, and is called a *prerogative presentation*. This right of the crown was formerly doubted, (*Wentworth v. Wright*, Owen, 144,) but has since been fully established and acted on, but the right must be exercised in the lifetime of the person promoted, otherwise the turn of the crown is lost. (2 Bl. Rep. 770; *Rex v. Bishop of London*, 1 Show. 464; 8 C. Show. P. C. 185; Com. Dig. *Eglise*, (H. 6.); *Archbishop of Armagh v. Attorney-General*, 2 Br. P. C. 514.) If after a grant of the next presentation to a living, the incumbent be made a bishop, by which the living becomes vacant, and the king is entitled to present, the grantee may present on the next vacancy occasioned by the death or resignation of the king's successor. (*Calland v. Troward*, 2 H. Bl. 324; 8 Br. P. C. 71; 6 T. R. 439, 778.)

The right of presentation given to the universities by the statutes 3 Jac. 1, c. 5, ss. 18, 19, 20; 1 Wm. & M. c. 26, s. 2; and 12 Anne, st. 2, c. 14, s. 1, arises only in the case of a sole patron, or all of several patrons professing the Roman Catholic religion. Where two are jointly seized of an advowson, the one being a Roman Catholic, the other a Protestant, the sole right is in the latter. (*Edwards v. Bishop of Exeter*, 7 Scott, 652; 5 Bing. N. C. 652; 3 Jur. 725. See *Cottingham v. Fletcher*, 2 Atk. 155.) By statute 12 Anne, st. 2, c. 14, the presentation to any benefice by any Roman Catholic is void. And by stat. 11 Geo. 2, c. 17, s. 5, every grant made of any advowson or right of presentation, collation, nomination, or donation, by any person professing the Catholic religion, or by any mortgagee, or trustee of such person, is void, unless it be for valuable consideration to a Protestant purchaser.

An advowson *devotee* being in the patron's disposal by his

own deed of donation, without presentation, institution, or induction, (Co. Litt. 344 a.) is not subject to lapse, (Id.; *Fairchild v. Gayre*, Cro. Jac. 63; *Britton v. Wade*, Id. 615,) unless such be the terms of the foundation, or unless the donative be augmented by Queen Anne's bounty, in which case it is subject to lapse, by stat. 1 Geo. 1, st. 2, c. 10, ss. 6, 14, in case there be no nomination within six months. (See *Mutter v. Chanvel*, 1 Mer. 475.) As to proof of augmentation, see 11 East, 478. The ordinary may, by ecclesiastical censures, compel the patron of a donative to fill the church. (3 Salk. 140; *Rex v. Bishop of Chester*, 1 T. R. 396.)

By stat. 21 Hen. 8, c. 13, if a person having a benefice with cure of souls, of the yearly value of 8*l.* or above, was instituted and inducted into any other benefice with cure of souls, the first benefice became void. (See, on the construction of this statute, *Boteler v. Allington*, 3 Atk. 453; *Botham v. Gregg*, 4 Moore & S. 230; *Halton v. Cove*, 1 B. & Ad. 530.) The stat. 1 & 2 Vict. c. 106, ss. 1—13, has repealed the stat. 21 Hen. 8, c. 13, and made new provisions as to pluralities, which provisions apply generally to all persons and benefices without distinction of value. By the 11th section of 1 & 2 Vict. c. 106, institution into a second benefice *ipso facto* avoids the first.

Simony.

By *simony*, which is a corrupt presentation of any one to an ecclesiastical benefice for money, gift or reward, the right of presentation to a living is forfeited, and vested, *pro hac vice*, in the crown. (8 B. & Cr. 25.) By the statute 31 Eliz. c. 6, it is, for avoiding of simony, enacted, that if any person shall for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for any promise, agreement, grant, bond, covenant of or for any sum of money, reward, gift, profit, or benefit, present or collate any person to an ecclesiastical benefice or dignity, such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice, and the crown shall present to it for that turn only. But if the presentee dies without being convicted of such simony in his lifetime, it is enacted, by stat. 1 W. & M. c. 16, that the simoniacal contract shall not prejudice any other innocent patron on pretence of lapse to the crown or otherwise. Also, by the stat. 12 Anne, stat. 2, c. 12, if any person, for money or profit, shall procure, in his own name, or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract, and the party is subject to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

Where a clerk, who had been presented corruptly, continued incumbent until his death above thirty years after, it was held that the king's right of presenting was not gone. (Noy, 25; Hob. 165.) And it has been lately decided, that where a clerk was simoniacally presented, instituted, and inducted, and

the king, on the ground of simony, presented another clerk, who was instituted and inducted, the king's presentee might maintain ejectment for the benefice against the other clerk, since the church was void by reason of his simoniacal presentation; (*See d. Watson v. Fletcher*, 8 B. & Cr. 25;) although it had been held in an early case that the king could not take advantage of the corrupt presentation until the clerk had been removed by *quare impedit*. (*Rex v. Bishop of Norwich*, Cro. Jac. 385.)

The ecclesiastical courts have jurisdiction to try questions of simony. (3 Phill. R. 171.) Simony on the part of a presentee to a living, being in law a very odious offence, and the consequences of conviction thereof highly penal, the law, even if a simoniacal agreement is established, requires the strictest proof of the presentee's privity thereto before induction, or of his confirmation thereof after; so, in proof that a clerk is *simoniacus promotus*, a corrupt agreement must be no less conclusively shown. In a criminal suit against a clerk for simony, and for being simoniacally promoted, the court holding, first, that neither his privity to, nor confirmation of, any simoniacal contract was proved: 2dly, that no criminal contract was established, dismissed him from the suit, and condemned the promoters in costs. (*Whish and Wollatt v. Hesse*, 3 Hagg. Eccl. R. 659.) In this case it was said, "The issue is, whether the defendant, either by himself or by any other person, made any contract or promise to procure the presentation. If any promise were made with his privity, he would be guilty of simony; if any promise were made without his privity, he would be simoniacally promoted. The private intention of the patron before the presentation, to get the lease of the tithes after, would not, unaccompanied by any antecedent promise, either by or on the behalf of the presentee, affect the validity of his presentation. The true issue is what was done before the presentation; for unless some simoniacal promise at that time is proved, no conviction can take place in a criminal suit for simony. What passed after presentation, institution, and induction, may tend to show that there was a previous corrupt bargain; but in order to have weight, these subsequent facts must bear that inference strongly." (Ib. 680, 681.) The stat. 3 & 4 Vict. c. 86, regulates the mode of proceeding against clergymen charged with any offence against the ecclesiastical law. (*See Reg. v. Archbishop of York*, 6 Jur. 412.)

General bonds, to resign at the patron's request, were held by the House of Lords to be simoniacal and illegal. (*Bishop of London v. Ffytche*, 2 Br. P. C. 811; *Mirehouse on Advowsons*, 252—259; *Cruise's Dig.* tit. 21, c. 2, s. 79; *Cunningham's Law of Simony*, p. 62; *Dashwood v. Peyton*, 18 Ves. 27; *Ex parte Rainier*, 1 Jac. & W. 280.) But it was afterwards considered that a bond to resign in favour of a particular person was valid, (*Newman v. Newman*, 3 Maule & S. 66,) until a recent case in the House of Lords, in which it was de-

Bonds of
resignation.

cided that there was no distinction between a bond conditioned for resigning *generally* on the request of the patron, and a bond conditioned to resign in favour of a *particular* relation of the patron, and therefore a bond for resigning in favour of one of two brothers of the patron was held simoniacal and void. (*Fletcher v. Lord Sondes*, 3 Bing. 501; 1 Bligh, N. S. 144, reversing the judgments of the B. R. and Exchequer Chamber.) In consequence of that decision, two statutes have been passed on the subject, rendering such bonds valid to a certain extent, and under certain regulations. By stat. 7 & 8 Geo. 4, c. 25, s. 1, it was enacted that no presentation to any spiritual office made before the 9th of April, 1827, should be void on account of any agreement to resign when another person specially named should become qualified to take the same, and that persons should not be subject to any penalty on account of having made any such agreement. And the second section enacts that every such engagement entered into before the 9th April, 1827, for the resignation of any benefice to the intent manifested by such engagement, that some person specially named therein, or one of two persons so specially named, should be presented to such spiritual office, or that the same should be given to him, or for the resignation thereof, upon notice or request, or otherwise, when a person or one of two persons so specially named should become qualified, by age or otherwise, to accept and take the same, shall be valid, with a proviso that the act should not extend to any engagement which should not have been made *bond fide* for the purpose aforesaid.

Engagements entered into for the resignation of any benefice upon notice or request to be valid.

By stat. 9 Geo. 4, c. 94, it is enacted, that every engagement by promise, grant, agreement, or covenant, *bond fide* made or entered into after 28 July, 1828, for the resignation of any spiritual office, being a benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intent to be manifested by such engagement, that any one person whosoever to be specially named therein, or one of two persons to be specially named therein, being such persons as are thereafter mentioned, shall be presented or appointed to such spiritual office, shall be valid, and the performance of the same may be enforced in equity; provided such engagement shall be so entered into before the presentation of the party entering into the same.

Relationship of such persons.

The second section enacts, that where two persons shall be so specially named in such engagement, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grandnephew of the patron or of one of the patrons of such spiritual office, not being merely a trustee or trustees of the patronage of the same, or of the person or one of the persons for whom the patron or patrons shall be a trustee or trustees, or of the person or one of the persons by whose direction such presentation shall be intended to be made, or of any married woman whose husband in her right shall be the patron or one of the patrons of such spiritual office, or of any

the person in whose right such presentation shall be intended to be made. The third section provides that no presentation to any spiritual office shall be void by reason of such engagement, and that it shall not be lawful for the king, by reason of such engagements as aforesaid, to present to or bestow such spiritual office, and persons making such agreement are exempted from penalties, and the presentations are made notwithstanding the statute 31 Eliz. c. 6. The deed by which the engagement is entered into must, by the fourth section of the act, be deposited within two calendar months with the registrar of the diocese or peculiar jurisdiction wherein the benefice is situated. By the fifth section every resignation must refer to the engagement, and state the name of the person for whose benefit it is made, and is made void unless such person is presented within six calendar months. The sixth section of the act provides, that it shall not extend to any case where the presentation, collation, gift, or bestowing to or of any such spiritual office, shall be made by the king in right of his crown or of his duchy of Lancaster; or by any archbishop, bishop, or other ecclesiastical person in right of his archbishoprick, bishoprick, or other ecclesiastical living, office, or dignity, or by any other body politic or corporate, whether aggregate or sole, or by any other person or persons in right of any office or dignity; or by any company, or any trustees for charitable or other public purposes, or by any person not entitled to the patronage of such spiritual office as private property.

It will be observed that the first section, 9 Geo. 4, c. 94, provides that the performance of the engagement thereby authorized may be enforced in equity; it had previously been decided that a specific performance of a covenant or agreement to resign a living would not be decreed by a court of equity, but the party was left to seek such redress as could be obtained in a court of law. (*Newdigate v. Helpe*, 6 Madd. 123.) In a suit for the specific performance of an agreement for the sale of the next presentation to a living, the court will restrain the bishop of the diocese from taking advantage of a lapse pending the suit. (*Nicholson v. Knapp*, 9 Sim. 326.)

No grant can be made by a subject of the next presentation Sale of next to a benefice when it is vacant; (Cro. Eliz. 174; 1 Leon. 167; presentation. 3 Leon. 226; Dyer, 282; *Bishop of Lincoln v. Wolferstan*, 1 Bl. R. 490; 2 Wils. 174; 3 Burr. 1512;) and a grant of a presentation after institution of the incumbent to a second living, which vacated the first, is also void, as the vacancy commenced from the time of such institution. (S. C.) But the crown by express words can grant a void turn. (Hob. 140; Cro. Eliz. 173; 2 Taunt. 69.) The reason why the next presentation does not pass when the living is actually void at the time of the sale is that the next turn is in that case not a part of the advowson. (*Rennell v. Bishop of Lincoln*, 7 B. & C. 112; 3 Bing. 223; *Mirchouse v. Rennell*, 8 King. 490.) The plaintiff being incumbent of the living of C., which was under the nominal value of 8*l.*, accepted the

living of O. with care of souls. Afterwards the patron of C. sold the advowson to L., and L. presented a clerk, who was instituted and inducted, and subscribed the articles. It was held, that the living as against the patron was void by the plaintiff's acceptance of O., and disannexed from the advowson; that consequently it did not pass by the sale; that L.'s presentee was not incumbent; and that the plaintiff not being ousted *de facto* might sue for tithes. (*Alston v. Atlay*, 7 Ad. & E. 289; 2 Nev. & P. 492.) And that it made no difference as to this, whether the patron of C. or his vendee knew or did not know of plaintiff's acceptance of O. (By the Court of Exchequer Chamber reversing the judgment of the Court of Q. B. Ib.) In this case *Tindal, C. J.*, said, "There is no question but that if a benefice be actually void by the death of an incumbent, by his resignation, or by cession under 21 Hen. 8, c. 13, or by deprivation, (*Leak v. Bishop of Coventry*, Cro. Eliz. 811,) the right to present upon that avoidance is not capable of being transferred either alone or with the entire advowson; it is a personal right or interest severed from the advowson and vested in the person of him who was the patron at the time; a chose in action, which is not assignable, and which is designated in the books by a great variety of names, all indicating its personal and unalienable quality." (7 Ad. & Ell. 304. See *Mirehouse v. Rennell*, 8 Bing. 518.) The purchase of an advowson in fee simple, when the incumbent was on his death bed, and died the next day, was held not to be simoniacal, where there appeared to be no privy of the clerk who was presented. (*Barrett v. Glubb*, 2 Bl. R. 1052; see *Gray v. Heskest*, Amb. 268.) The right to sell the next presentation to a benefice continues as long as the incumbent is in existence. And therefore where it was found by special verdict "that the incumbent of a living was at the time of the sale of the next presentation afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby greatly despaired of, and that he was so afflicted with such mortal disease and in extreme danger of his life, and his life was and continued to be greatly despaired of until his death," which happened at half-past eleven at night of the day on which the sale was completed; it was held that the bargain and sale of the next presentation, the incumbent, to the knowledge of both parties, being in *extremis*, but without the privy, or view to the nomination, of any particular clerk, was not simoniacal, so as to entitle the bishop to reject the clerk subsequently presented. (*Fox v. Bishop of Chester*, 1 Dow, N. S. 416; 8. C. 2 B. & Cr. 635; 4 Id. 555; see *Sheldon v. Brett*, Winch, 63.) The judgment in the case of *Fox v. Bishop of Chester* appears to have proceeded principally on the difficulty of establishing a rule that should settle what degree of probability of the approaching death of an incumbent should prevent the sale of the next avoidance of a benefice, and the greater difficulty of ascertaining by evidence when an incumbent was within that degree. (1 Dow, N. S. 433, 434.)

Estates subsequent to Estates Tail.

XXXII. And be it further enacted, that in the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit*, action, or suit, shall be limited accordingly.

When person claiming an advowson in remainder, &c. after an estate tail shall be barred.

Extreme period of Limitation One Hundred Years.

XXXIII. Provided always, and be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title. (x)

No advowson to be recovered after 100 years.

(x) It will be observed that there is no saving of the rights of persons under disabilities. It will still be necessary to require abstracts of titles to advowsons to be carried back for a century at least. An abstract of title to an advowson should be accompanied with evidence that the presentations have from time to time been made by the persons appearing to be the owners of the advowson. Sir W. Blackstone observes,

that instances are not wanting, wherein two successive incumbents have continued for upwards of a hundred years; and states as an instance, that two successive incumbents of the rectory of Chelsfield cum Farnborough, in Kent, continue 101 years; of whom the former was admitted in 1650, the latter in 1700, and died in 1751. (3 Chitt. Bl. Comm. 250 Co. Litt. 115, a.)

FINAL EXTINGUISHMENT OF RIGHT.

At the end of the period of limitation the right of the party out of possession to be extinguished.

XXXIV. And be it further enacted, that at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished. (y)

(y) This section of the act is new in principle, as the former statutes of limitation were held not to bar the right but merely the remedy. (See 1 Wms. Saund. 283, a. n.; 2 B. & Ad. 413; 1 B. & Ald. 93; 1 Ld. Raym. 422) The statute of limitations was held to operate as an extinguishment of the remedy of one, and not as giving the estate to the other, where one heir in gavelkind had disseised the other, and been in the sole possession sixty-two years. (1 Bl. R. 678.)

RECEIPT OF RENT.

Receipt of rent to be deemed receipt of profits.

XXXV. And be it further enacted, that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease,) be deemed to be the receipt of the profits of the land for the purposes of this act.

REAL AND MIXED ACTIONS ABOLISHED.

Real and mixed actions abolished after the 31st December, 1834;

XXXVI. And be it further enacted, that no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de ra-

tionabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisiis, writ of right of ward, writ de consuetudinibus, et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de thelonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra ætatum, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action real or mixed (except a writ of right of dower, or writ of dower unde nihil habet (a) or a quare impedit, (a) or an ejectment, (b) and no plaint in the nature of any such writ or action (except a plaint for freebench or dower), shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-four.

except for
dower, quare
impedit, and
ejectment.

(2) The right to bring real actions is preserved for a limited time by the 37th and 38th sections, the latter of which is still in operation. (See *post*, p. 226.)

If a tenant in a writ of right obtain judgment on demurrer to the count, the demandant not joining in the demurrer but making default, the judgment for the tenant ought not to be final, no issue being joined on the mise. A judgment under such circumstances, barring the demandant as to the present action, is, so far, good; but if it also adjudge that the tenant shall hold to him and his heirs quit of the demandant and his heirs for ever, that part is erroneous, and judgment ought so far

to be reversed. So held by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench. (*Nesbit v. Rishton*, 11 Ad. & El. 244; 6 Ad. & El. 103; 9 Ad. & El. 426; 2 Per. & D. 706.

Recovery of
dower.

A writ of right of dower lies when a widow has dower of part of the lands in the same vill, for then she cannot have dower *unde nihil habet* against the same tenant. (Com. Dig. Dower, (G. 1.) See Roscoe on Real Actions, 29.) Dower *unde nihil habet* is a writ of right in its nature, and lies in all cases where a woman has a right of dower, except where she has part from the same tenant in the same vill where she now demands it. (Com. Dig. Dower (G. 2.) See Roscoe on Real Actions, 39; 2 Wms. Saund. 43—45 d. notes; Roper on Husband and Wife, c. 9, s. 5, where the mode of proceeding is fully explained.) It has been held that copyholders shall neither plead nor be impleaded for the tenements which they hold by copy by the king's writ, but shall have their plaints in the nature of the several actions at common law, unless the dispute arise between the lord and his tenant. (2 Watk. on Cop. 35.) And the plaint in the nature of a writ of dower lies in the manor court. (4 Rep. 30 b. See *Rex v. Coggan*, 6 East, 431, n.; *Scott v. Kettlewell*, 19 Ves. 336; *Widowson v. Earl of Harrington*, 1 Jac. & Walk. 532; 1 Scriven on Cop. 562, *et seq.* 3rd ed.) Courts of equity show great indulgence to a dowress on account of the great difficulty of determining *a priori* whether she could recover at law, ignorant of all the circumstances, and the person against whom she seeks relief having in his possession all the information necessary to enable her to establish her rights. (6 Ves. 89.) Therefore a court of equity will assist a woman claiming dower, by putting out of her way a term which prevents her obtaining possession at law; but that is only as against an heir; (*Lord Dudley & Ward v. Lady Dudley*, Prec. Ch. 241;) or volunteer, not a purchaser; (*Lady Radnor v. Rotherham*, Prec. Ch. 66; but see *Williams v. Lamb*, 3 Br. C. C. 264, and note by Eden;) the heir or volunteer being considered as claiming in no better right than she does. A person being seised of an estate of inheritance, subject to a term outstanding for a purpose still unsatisfied, married in 1796; in 1805 mortgaged the estate, and died in 1825; it was held that the widow having a judgment in dower was relievable in equity against the outstanding term, and should have her dower subject to one-third of the charges affecting the term. Neither party in this case having got the legal estate under control, there was no pretence for saying that equity ought not to give the preference to the dowress, who was the first incumbrancer. (*Wilkins v. Lynch*, 1 Hayes' Ir. R. 98) When any question of dower has arisen in courts of equity, and doubts have been entertained of the title to dower, the practice has been to put the widow to bring her writ of dower at law. The courts will assist her in trying her right, and enjoying the benefit of it, if determined

at law in her favour, by giving her a discovery of title deeds; by ascertaining metes and bounds; and they do not require her to execute the writ with all the formalities necessary at law; and the right being ascertained by judgment at law will give her possession according to her right; but still they require that the question of her title to dower, if subject to doubt, should be determined at law. (*D'Arcey v. Blake*, 2 Sch. & Lef. 391.) If the right of dower is not controverted, the Court of Chancery has a concurrent jurisdiction, and writs of dower may be considered as having almost gone out of use. (*Mundy v. Mundy*, 2 Ves. jun. 122. As to costs in writs of dower, see stat. 20 Hen. 3, c. 1; Roscoe on Real Actions, 321. And as to damages, see Roscoe on Real Actions, pp. 309—313; 1 Fonbl. Eq. 22.) There are conflicting authorities (*Purless v. Cooke*, 2 Freem. 24; *Rogers v. Seale*, Id. 84; *Parker v. Nyikmore*, 2 Eq. Abr. 79, pl. 1; *Jerrard v. Saunders*, 2 Ves. jun. 454) upon the point whether a plea of a purchase for valuable consideration without notice be an answer to a bill by a dowress against a *bond fide* purchaser. Lord Thurlow held that such a plea would bar an *equitable*, but not a *legal* title; (*Williams v. Lambe*, 3 Br. C. C. 264;) which was followed in *Collins v. Archer*, (1 Russ. & M. 292,) where it was held that such a plea would not be available against a *legal* title on a bill filed for an account of tithes. (See *Payne v. Compton*, 2 Y. & Coll. 457; 2 Sugd. V. & P. 308—310; 1 Story's Eq. Jurisp. 510—512.) If the wife be divorced *à mens et thoro*, a court of equity will not assist her in recovering dower, but leave her to her remedy at law. (*Shute v. Skute*, Prec. Chan. 111. See Roper on Husband and Wife, c. 9, s. 5, 2; Shelford on Law of Marriage and Divorce, 420.)

(c) By the common law there were three writs for the church itself: viz. *Right of Advowson*, *Quare impedit*, and *Assise of darrein presentment*. (2 Inst. 357.) The writ of *quare impedit* is the remedy by which, where the right of a party to a benefice is obstructed, he recovers the presentation, and is the form of action now constantly adopted to try a disputed title to an advowson. (Booth on Real Actions, 233; 3 Chitty, Pl. 563; 2 Inst. 356; Com. Dig. *Quare impedit*, (D.). With respect to the proceeding by *quare impedit*, see 3 Bl. Comm. 246—252; Roscoe on Real Actions, index; 2 Starkie on Ev. 692—694, 2d ed.; Rogers Eccl. L. pp. 22—34; *Reg. v. President, &c. of Cathedral Church of Exeter*, 4 P. & Dav. 252.) It has been held, that in a proceeding by *quare impedit*, the plaintiff must prove that he, or those under whom he claims, have made a presentation to the living. This is the only legal evidence of the right. If it were otherwise, any person might set up a claim to present a clerk without a shadow of right, and contrary to reason and common sense. (*Cook v. Elphin*, 5 Bligh, N. S. 128.) In another case, where a party claimed to present in the fourth turn in right of one of four coparceners, it was held sufficient to allege in the declaration a presentation by the ancestor under whom all the coparceners claimed. The

Quare
impedit.

declaration alleged that the advowson had descended to the four coparceners, and they not agreeing to present jointly on the first vacancy, the elder sister presented, and afterwards, on two subsequent vacancies, that A. and B. presented in right of the second and third sisters respectively, it was held that it was to be presumed that those presentations were by right and not by usurpation, and therefore did not turn the estate of the coparceners to a mere right; and that *quare impedit* was maintainable by a grantee of the fourth coparcener, and that it was not necessary for the plaintiff claiming to present in the fourth turn in right of the youngest sister, to show that the presentations in the turns of the other sisters were made by right. (*Gully and others v. Bishop of Exeter*, 10 B. & Cr. 584; 8 C. 5 Bing. 171; see 2 M. & P. 105; 4 Bing. 525.) An advowson descended to four coparceners, A., B., C., and D., who agreed to present in succession, according to their seniority. When the third turn came, C. had died, leaving two co-heirs, E. and F., between whom the right to present was disputed. F., however, presented, and on the next avoidance E. presented. It was held that the presentation by E. and F. were to be counted, though they were usurpations on the rights of F. and D. respectively, and that on the seventh avoidance F. would be again entitled to present. (*Richards v. Earl of Macclesfield*, 7 Sim. 257. See *Pyke v. Bishop of Bath and Wells*, Bac. Abr. tit. Joint Tenants (H.) vol. 4, p. 482, 7th ed.)

In another case it was held that it was not competent to the bishop to dispute the title of the patron, at least before collation, as two persons are never permitted to dispute concerning the title of a third in his absence: and, therefore, where in *quare impedit* the count stated that the plaintiff was admitted, &c. into the rectory of S. L., and so being incumbent of the said church, afterwards accepted and was admitted, &c. into the vicarage of O. P., the said vicarage and the said rectory being respectively each of them a benefice with cure of souls, whereby it then belonged to the plaintiff as patron to present to the church of S. L.; and that he did present to the late bishop one W. B., a fit person in that behalf, but the bishop refused to admit him: the defendant (the bishop) pleaded, that before the church of S. L. became vacant, after the plaintiff accepted and was admitted, &c. into the vicarage of O. P. as in the declaration mentioned, and before the plaintiff presented the said W. B. in the declaration mentioned, the plaintiff conveyed to one J. H. the advowson, &c. of S. L.: such plea was held bad on demurrer, as it was not competent to the bishop to dispute the title of the patron, at least before collation. 2d. That to avoid the first living, it was not necessary that it should appear on the face of the count that it was of the value of 8l. a year or more in the king's books. And 3dly, that the patron being himself the incumbent, no sentence of deprivation was necessary to render the first living void. (*Apperley v. Bishop of Hereford*, 3 Moore & Scott, 102, in which the court relied on *Elvis v. Archbishop of York*, Hob.

316; and the 1st resolution in Holland's case, 4 Rep. 75, b.) In *quare impedit*, the plaintiffs alleged that they, being the majority of certain persons entitled under a custom, nominated W. C. The defendants pleaded, that they were the majority, and nominated E. P.; without this that plaintiffs were the majority. A replication, that the defendants did not duly nominate E. P. was held bad. (*Earl Harrington v. Bishop of Litchfield*, 4 Bing. N. C. 77; 7 Scott, 371.)

By statute 4 & 5 Wm. 4, c. 39, after reciting that the delay and expense of recovering advowsons, and the rights of patronage and presentation to ecclesiastical benefices, by actions of *quare impedit*, were much increased by reason of the defendant in such actions not being liable for the payment of costs, and the true patrons were thereby frequently deterred from the prosecution of their just rights; and that it was also expedient to afford further protection to incumbents of advowsons from vexatious and unfounded proceedings to disturb them in the enjoyment thereof: it is enacted, "That in all writs and actions of *quare impedit* issued or brought from and after the passing of this act in England, Wales, or Ireland, where a verdict shall pass or be given for the plaintiff or plaintiffs in any such writ or action, the plaintiff or plaintiffs in every such writ or action, in addition to the damages to which he or they is or are by law now entitled, shall also have judgment to recover his or their full costs and charges against the defendant or defendants therein, to be assessed, taxed, and levied in such manner and form as costs in personal actions are now by law assessed, taxed, and levied; and where in any such writ or action the plaintiff or plaintiffs therein shall discontinue, or be nonsuited, or a verdict shall be had against him or them, that then the defendant or defendants in every such writ or action shall have judgment to recover his or their full costs and charges against the plaintiff or plaintiffs therein, to be assessed, taxed, and levied in manner aforesaid: provided always, that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the judge who shall try the cause, or if there shall be no trial by a jury, the court in which judgment shall be given, shall certify that such archbishop, bishop, or other ecclesiastical patron or incumbent had probable cause for defending such action; but in no case when the defence to any such action shall be grounded upon a presentation or presentations, collation or collations previously made to any benefice, shall such presentation or presentations, collation or collations, be deemed or considered probable cause for defending such action." A bishop, defendant in *quare impedit*, who fails upon demurrer, may be exempted from costs by the certificate of the court under 4 & 5 Wm. 4, c. 39. (*Edwards v. Bishop of Exeter*, 6 Bing. N. C. 146; 7 Scott, 652, 679.)

(b) An *ejectment* is a possessory action, wherein the title to lands and tenements may be tried, and the possession re-

Act giving costs in *quare impedit*.

Costs may be recovered in actions of *quare impedit*.

If plaintiff is nonsuited, &c. defendant to have judgment.

Exception.

Ejectment.

covered in all cases where the party claiming title has a *right of entry*, whether such title be to an estate in fee, fee tail, for life, or for years. In order to maintain an ejectment, the party at whose suit it is brought must have been in possession, or at least clothed with the right of possession, at the time of the actual or supposed ouster, (Keilw. 130, a.;) hence this action is termed a possessory action. The party who has the legal estate in the lands in question must prevail; hence a party who claims under an elegit, (*Doe d. Da Costa v. Whar-ton*, 3 T. R. 2,) subsequent to a lease granted to a tenant in possession, cannot recover, although he gave notice to the tenant that he does not intend to disturb the possession, and only means to get into the receipt of the rents and profits of the estate, (Selw. N. P. Ejectment, s. 1.) It will be observed that the 39th section of the act 3 & 4 Will. 4, c. 27, by enacting that no descent cast, discontinuance, or warranty, which may be made after the 31st December, 1833, shall toll or defeat any *right of entry* or action for the recovery of land, has extended the remedy by ejectment to cases in which it was not before applicable. The action by ejectment is a subject too extensive to be entered upon in a work of this nature, and therefore the reader is referred for the necessary information upon the subject to writers who have treated upon it at large. (See Adams on Ejectment; Roscoe on Real Actions, 481—620; Woodfall's Law of Landlord and Tenant, by Harrison and Wollaston; 2 Starkie on Ev. 288—318, 2d ed.; Selw. N. P. tit. Ejectment; 2 Phillips on Ev. c. 15; Harrison's Index, tit. Ejectment.)

By stat. 1 Wm. 4, c. 70, s. 36, where the right of entry accrues to a landlord in or after *Hilary* or *Trinity* term, he may at any time within ten days serve a declaration in ejectment specially entitled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenant in possession to appear and plead thereto within ten days. The statute was held not to apply where the right accrued on the 20th May, after the *essoign* day, but before the first day of term. (*Doe v. Roe*, 1 Dowl. P. C. 79.) By the 37th section, the declaration may be entitled specially of the day next after the day of demise, whether in term or in vacation. This statute is confined to issuable terms only. (*Doe v. Roe*, 2 Crompt. & J. 45.) In ejectment under the last-mentioned act, it was held to be no ground for setting aside a verdict for the plaintiff, that he did not give six clear days' notice of trial, as required by that section, the defendant having appeared and made his defence. (*Doe d. Antrobus v. Jepson*, 3 B. & Ad. 402.) By the 38th section of the same act, in all cases of trials of ejectments at *Nisi Prius*, when a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of defendant's appearance to confess lease, entry and ouster, the judge before whom the cause shall be tried may certify on the back of the record that a writ of possession ought

to issue immediately, and upon such certificate a writ of possession may be issued forthwith, and the costs taxed, and judgment signed, but such writ, instead of reciting a recovery by judgment, is to recite that the cause came on for trial at the Prius at such time and place before the judge (naming him,) and that the said judge certified his opinion that a writ of possession ought to issue immediately.

Saving Clauses.

XXXVII. Provided always, and be it further enacted, that when on the said thirty-first day of December one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June one thousand eight hundred and thirty-five, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years herein-before limited shall have expired. (c)

Real actions may be brought until the 1st June, 1835.

(c) A writ of right was issued before the expiration of the time allowed by this section; after that time had expired the return day of the writ was altered, and the writ was resealed; it was held that the writ must be considered as having been brought after the time limited by the act; and it was therefore superseded. (*Foot v. Collings*, 1 My. & Cr. 250.)

XXXVIII. Provided also, and be it further enacted, that when, on the said first day of June one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June one thousand eight hundred and thirty-five, but only within the period during which, by virtue of the provisions of this act, an entry might have been made upon the same land by the person

Saving the rights of persons entitled to real actions only at the commencement of the act, &c.

bringing such writ or action if his right of entry had not been so taken away. (d)

Formedon still lies.

(d) This saving is still in operation, but the rights preserved by it must be enforced within the time allowed by the act, where a right of entry exists. By a will in 1789, an estate was devised to A. G. M. for life, with remainder as he should by deed or will appoint; and in default of appointment, remainder to the heirs of his body, with remainder over. In 1790, A. G. M. levied a fine to the use of himself in fee, and afterwards died without issue, it was held in an ejectment by the lessors of the plaintiff, claiming as heirs at law of A. G. M., that the fine created a discontinuance, and gave a tortious fee to A. G. M., and that his heir at law was consequently entitled to recover in ejectment, the remainders over being divested, and the rights of the remainder men only capable of being enforced by real action. In such a case the stat. 3 & 4, Will. 4, c. 27, s. 38, preserves the right of the remainder man to bring a formedon. (See *ante*, p. 129; *Doe d. Gilbert v. Ross*, 7 Mees. & W. 102. *Seymour's case*, 10 Rep. 96 a; *Doe d. Cooper v. Finch*, 4 B. & Ad. 283; 1 Nev. & M. 130; *Doe d. Jones v. Jones*, 1 B. & C. 238; 2 D. & R. 373; 2 Sugd. V. & P. 359, 10th ed.; 1 Hayes, Conv. 237, 5th ed.)

In formedon the tenant, having demanded a view after a general imparlance, the demandant issued a writ of *petit cape*, which was held to be irregular; (*Tolson v. Watson*, 3 Bing. N. C. 770;) because the latter writ can only be awarded where a default has been committed by the tenant, and in this case there had been no such default; instead of suing out that writ, the demandant ought to have counterpleaded or demurred. Demand of view in formedon may be withdrawn on payment of costs, when the delay in the application is sufficiently accounted for. (*Tolson v. Fisher*, 3 Bing. N. C. 783; 4 Scott, 569.) The tenant in a writ of formedon, having demanded a view, for the avowed purpose of obtaining more time than he could obtain upon a judge's order for the time to plead, the demandant having counterpleaded that the tenant was in possession of the land demanded, and of none other in the parish, the court allowed the latter to withdraw the demand of view on payment of costs, notwithstanding the propriety of the step had been the subject of discussion in a preceding term. (*Tolson, dem. Watson*, ten., 5 Scott, 77.)

DESCENT CAST, DISCONTINUANCE, AND WARRANTY.

XXXIX. And be it further enacted, that no descent cast, discontinuance, or warranty(e), which may happen or be made after the said thirty-first

No descent,
warranty, &c.
to bar a
right of entry.

day of December one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land.

(c) A mere entry is not possession. Continual or other Descent: claim will no longer preserve any right of entry, or distress or action. (*Ante*, pp. 163, 164, sects. 10, 11.) By the common law, descents of corporeal inheritances in fee simple took away the entry of the party who had right; (Litt. s. 385;) as if a disseisor died seised, and the lands descended to his heir, the entry of the disseisee was thereby taken away unless there had been a continual claim; (Litt. s. 414;) and the like law was of an abatement and intrusion, and of the feoffees or donees of abators or intruders. But by stat. 32 Hen. 8, c. 33, the "dying seised of any disseisor of and in any lands, &c., having no title therein, shall not be deemed a descent to take away the entry of the person or his heir, who had lawful title of entry at the time of the descent, unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled." If a disseisor died after five years' quiet possession, and the disseisee entered, the heir of the former might have maintained an ejectment, for the right of possession belonged to him, although the mere right was in the disseisee. (*Smyth v. Tyndall*, 2 Salk. 665.) The doctrine of descent cast did not apply, if the claimant was under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm; because in all these cases there was no laches or neglect in the claimant, and therefore no descent took away his entry; (Litt. l. 3, c. 6;) nor did it affect copyhold or customary estates, where the freehold is in the lord; (*Doe d. Cook v. Danvers*, 7 East, 299;) nor cases where the party has not any remedy but by entry as a devisee. (Co. Litt. 240 b; 7 East, 321. On descent cast, see Co. Litt. 237 b; Bac. Abr. Descent (F.) (G.) (H.); Com. Dig. Descent (D.); Roscoe on Real Actions, 81—87; Adams on Ejectment.)

A discontinuance of estates in lands and tenements is defined by Lord Coke to be "An alienation made or suffered by tenant in tail, or by any that is seised in *auter droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action and cannot enter." (Co. Litt. 325 a.) At common law, an estate might be discontinued five ways; 1. By feoffment. 2. By fine. 3. By common recovery. 4. By confirmation: and 5. By release with warranty. A grant, by deed or fine, of such things as lie not in livery (Litt. s. 618; Co. Litt. 332 a), does not work any discontinuance.

A discontinuance of an estate tail could only be made by a tenant in tail in possession; (*Doe d. Jones v. Jones*, 1 Barn. & Cress. 243;) and where tenant for life joined with a remainder-man in tail in making a lease for lives, it was held

Discontinu-
ance.

not to create a discontinuance. (*Trevilian v. Lane*, Cro. Eliz. 56. See 1 Rep. 76 a; Litt. s. 658; Co. Litt. 325 a.) But the existence of a term of years prior to the estate of a tenant in tail did not prevent a fine levied by him from operating as a discontinuance; thus, where lands were limited to A. for five hundred years, remainder to B. in tail, remainder to C. in tail, reversion to B. in fee; and B. levied a fine with proclamations to the use of himself in fee; it was held that although the estate for years of A. continued, the estate of B. was discontinued, and the remainder in tail to C. divested. (*Doe v. Finch*, 1 Nev. & Mann. 130; and see the notes to that case, where much learning on the subject of discontinuance, &c. is collected; S. C. 4 B. & Ad. 283. As to discontinuance, see Bac. Abr. and Com. Dig. Discontinuance; Co. Litt. 325 a, 347 b, and notes by Butler; Roscoe on Real Actions, 43—53; 1 Prest. on Conv. and on Abst. Index; Roper on Husband and Wife, c. 2, s. 2; *Doe d. Gilbert v. Ross*, 7 Mees. & W. 125.)

Warranty.

As to the law of warranty, see Com. Dig. *Guaranty*; Co. Litt. 365 a, 393 b, and notes by Butler; Bac. Abr. *Warranty*; Shepp. T. 181—203. In a recent case, where A., tenant for life, remainder to B. his wife for life, remainder to the heirs of the body of B. by A. to be begotten; and C., the issue of A. and B., in their lifetime levied a fine come ceo, &c., without proclamations, but containing a clause of warranty; and C. survived A. and B., and died leaving issue D.; it was held that the right of entry of D. was taken away by the effect of the warranty. (*Doe d. Thomas v. Jones*, 1 Crompt. & Jerv. 528; S. C. 1 Tyrw. 506.) Bystat. 3 & 4 Will. 4, c. 74, s. 14, all warranties of lands which shall be made after the 31st December, 1833, by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail, (see post.)

CHARGES AND LEGACIES.

Time of Limitation fixed, Twenty Years.

Money charged upon land and legacies to be deemed satisfied at the end of twenty years, if there shall be no interest paid or acknowledgment in writing in the meantime.

XL. And be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty-three, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage (*f*), judgment (*g*), or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy (*h*), but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a

discharge for or release of the same (i), unless in the meantime some part of the principal money, or some interest thereon, shall have been paid (k), or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given (l).

(f) This section relates to actions brought to recover money, and these actions, in case of mortgages, are either upon the covenant usually inserted in the mortgage deed, or on the bond which commonly accompanies it. (*Doe d. Jones v. Williams*, 5 Ad. & El. 296.) This section is not to be construed as restricted to actions against real estate, but as affecting charges on real estate, whether sought to be enforced against either the real or personal representatives. (*O'Hara v. Creagh*, 1 Longfield & Towns. 65; *Sheppard v. Duke*, 9 Sim. 567.)

What cases come within this section.

(g) When a judgment creditor had allowed twenty years to elapse without taking steps to recover his debt, and then ascertained that during the twenty years a suit had been instituted for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part payment of their debts, and that there was money in court available for payment of the remainder, it was held that he was barred by stat. 3 & 4 Will. 4, c. 27, s. 40, from proving his debt before the Master, and receiving payment rateably with the other creditors, the statute providing that such a claim should not be made after twenty years, unless in the mean time part of the money, either principal or interest thereon, should have been paid, or some acknowledgment should have been given in writing. Those being the only exceptions in the act in which nothing was said of the case of a bill being filed by one creditor for the benefit of the rest. The court considered the case as a proceeding in equity to recover money upon a judgment upon which twenty years had run, and that it came within none of the exceptions of the statute. (*Berrington v. Evans*, 1 Y. & Coll. 434; see *Sterndale v. Hankinson*, 1 Sim. 393; *O'Kelly v. Bodkin*, 2 Ir. Eq. R. 369; *Peyton v. McDermott*, 1 Drury & W. 198; see post, pp. 248, 249.)

Judgment barred by twenty years delay.

It was held by nine judges in Ireland against one, that the twenty years, fixed by section 40 of 3 & 4 Will. 4, c. 27, as judgment. the period within which proceedings on a judgment should be taken, begin to run from the date of the last judgment of revival, and not from the entry of the original judgment.

Revival of judgment.

(*Farran v. Ottiwell*, 2 Jebb & Symes, 97; 2 Brady, Adair & Moore, 110; Sausse & Sc. 218, n.; *Kealy v. Bodkin*, 1 Sausse & Sc. 211.) The question was shortly this, whether upon a judgment obtained in 1810, duly revived in 1818, the plaintiff could recover in 1837, no interest or principal having been paid on it, nor any acknowledgment of the right thereto having been given in writing, during the period of twenty-seven years which intervened between the time when the judgment was originally obtained in 1810, and the issuing of the *scire facias* in 1837. *Foster*, B., thought that one of the leading objects of the statute was, that land should not continue to be bound either by mortgage or by judgment, or by any sort of lien or incumbrance, for a longer period than twenty years, unless there should be either a payment of some principal or interest on account of the sum of money secured by such lien, or else some acknowledgment given in writing of the right of the creditor claiming by virtue of such lien within twenty years next before the attempt to assert such his claim. In short that the lapse of twenty years should constitute a bar to the claim, unless there had been either some payment on account of the money due, or some written acknowledgment of the subsistence of the lien; and that it was the object of the act to exclude every other mode of preserving the lien in existence for more than twenty years, except only these two, namely, either actual payment on account, or actual acknowledgment in writing. The judgment creditor here in effect contends for a third mode, namely, the process of reviving the judgment. This, he says, shall operate to preserve the lien. The true statement of the question, therefore, between the parties in the present case is, whether a judgment of revivor shall preserve the lien, though no payment be made, or acknowledgment in writing given. (*Farran v. Ottiwell*, 2 Jebb & Symes, 117, 118.) Notwithstanding the 3 & 4 Will. 4, c. 27, s. 40, the revival of a judgment by *scire facias* within twenty years, is sufficient to enable a party to proceed at law or in equity for recovery of the sum thereby secured, although more than twenty years have elapsed since the rendition of the original judgment. (*Ryan v. Cambie*, 2 Haig. S. & M. Irish Eq. R. 328; see *Brady v. Fitzgibbon*, 1 Jebb & S. 503; *Palmer v. Algen*, 1 Jebb & S. 501; *Kelly v. Crogan*, 2 Brady, A. & M. 88; *Dillon v. Kennedy*, 1 Jebb & S. 579.) Where a judgment has been entered more than a year and a day, it must be revived by *scire facias*, in order that the defendant may have an opportunity of showing why execution should not be issued against him. (Stat. 13 Edw. 1, c. 45; 2 Inst. 469; 3 Bl. Comm. 421; 3 Bac. Abr. Execution (H.); *Anon Loftt*, 329; *Portland v. Newman*, 6 Maule & S. 179; 2 Chitty, 324.) By R. G. 2 Wm. 4, r. 79, this writ cannot be obtained after ten years without a motion for that purpose in term, or a judge's order in vacation; nor, if more than fifteen, without a rule to show cause. An agreement not to insist upon a *scire facias* to revive a judgment against the defendant after

the year had elapsed was held to be valid. (*Morris v. Jones*, 3 D. & R. 605; 2 B. & C. 242; *Houell v. Stratton*, 2 Smith, 66; but see *Heath v. Brindley*, 2 Ad. & Ell. 368, which has thrown some doubt upon *Morris v. Jones*.)

The statute of limitations does not begin to run against a judgment entered on a *post obit* bond, until the death occurs upon which the bond is payable. (*Barber v. Shore*, 1 Jebb & Symes, 610.)

(A) It has been already stated (*ante*, p. 105), that doubts were entertained whether this section extended to any legacies not charged on land. In *Sheppard v. Duke*, 9 Sim. 569, *Shadwell*, V. C., said, "the 40th section of the act introduces the words 'or any legacy,' after it has enumerated those things which are charged on land. Is not the use of the word 'legacies' in the 43d section evidence that, when the legislature uses that word, it must mean a legacy capable of being sued for in the Ecclesiastical Court, that is a legacy payable out of personal estate only? It seems to me impossible to get over the inference that arises on that section. For it would be absurd to say that when that section limits the time for instituting a suit in the Ecclesiastical Court for a legacy, it means a suit for payment of a legacy charged on land; when, if an attempt were made to enforce, by a suit in the Ecclesiastical Court, the payment of a legacy charged on land, a prohibition would issue as a matter of course."

In another case, a testatrix, who died in 1808, gave a legacy of 200*l.* to the daughter of a person whom she appointed residuary legatee and executor. This executor died in 1824, without having paid the legacy, and left his daughter (the legatee) tenant for life of his property, which he charged with his debts. She attained twenty-one in 1815: it was held that the legacy could not be included in the charge for payment of debts under the executor's will; and that the legatee was barred by lapse of time and nonclaim, under the 3 & 4 Will. 4, c. 27, s. 40, from recovering the legacy. (*Piggott v. Jeffreys*, 5 Jurist, 796, V. C. S.)

Residuary property is within this section, where a present right to receive the residue had accrued thirty years ago, and it was not contended that any suit was necessary for ascertaining the amount of the residue. (*Prior v. Horneblow*, 2 Y. & Coll. 200; *ante*, p. 105.)

The 25th section of this act qualifies the provisions of the 40th, where the suit is to compel a party to account for a breach of trust. (*Phillipo v. Munnings*, 2 My. & Cr. 309; see *ante*, p. 189.) In *Dillon v. Cruise*, (3 Ir. L. & Eq. R. 70,) it was decided, that where a trust is created for the payment of debts, the rights of a judgment creditor to the benefit of that trust is not affected by the 40th section of this act. Where a party receives money in the character of a trustee, the statute of limitations will not run in his favour. (*Ex parte Bolton*, 1 Deac. & C. 556; see *post*, p. 253, as to presumption of payment of legacies.)

Meaning of words, "present right to receive," &c.

(i) It seems difficult to attach any definite meaning to the words "*present right, &c.*" and to say whether those words mean such a right as the party could render effectual, or whether the disability to proceed effectually either at law or in equity prevents the right from being considered as having accrued within the meaning of this section. (See *Dillon v. Cruise*, 3 Deasy, S. J. & M. 82.) This section appears to be capable of two interpretations; the one construing the terms within twenty years next after a present right to receive the same to mean, within twenty years after the first present right to receive the same accrued to any person; the other construing them to mean within twenty years next after a present right, established or accrued under any of the securities mentioned in this clause. (2 Jebb & Symes, 109.) It will be observed that the word *first* does not precede the word *accrued* in the fortieth section as it does in the second section, and the omission of that word may in many cases make a material difference in the construction of this section. (*Ryan v. Cambie*, 2 Ir. Eq. R. 334.)

Part payment.

(k) The entering into the receipt of rents and profits by a mere equitable mortgagee, was held sufficient to keep the debt alive. (*Brocklehurst v. Jessop*, 7 Sim. 438.) Where a bond is entered into as a collateral security for money secured by mortgage, and the interest being in arrear, the mortgagee takes possession and remains in possession upwards of twenty years without taking interest otherwise than by the receipt of rents and profits, it seems questionable whether his remedy on the bond is not barred in equity as well as at law by the statute of limitations. (*White v. Hillacre*, 3 Y. & Coll. 597.) Under the fortieth section the acknowledgment of the right must be given in writing, signed by the person by whom the same shall be payable or his *agent*, to the person entitled or his *agent*. Under the forty-second section the acknowledgment must be given to the person entitled to the interest or his *agent*, signed by the person by whom the same was payable or his *agent*. The words of these two sections being nearly the same, it seems to be the more convenient course to arrange the decisions as to acknowledgments under both these sections in one note. As to acknowledgments under the fourteenth and twenty-eighth sections, see *ante*, pp. 170, 171, 200.

Acknowledgments in writing.

Who is agent.

In reference to this and the other sections, where the acknowledgment is made by the party interested or his *agent* is made sufficient (see *ante*, p. 171), it will be necessary to consider who is in law the agent, and by what acts he is so constituted, where no direct proof of agency is produced. An agent need not be authorized in writing. (*Coles v. Trecothick*, 9 Ves. 250.) Wherever a specific appointment of an agent is necessary, a subsequent recognition of acts done by him in that capacity is better even than a previous authority. (*James v. Bright*, 5 Bing. 533; 2 M. & P. 120; per *Best*.) So a subsequent ratification by a principal of a contract by an agent, is equivalent to a previous authority.

(*Maclean v. Dunn*, 1 M. & P. 761; 4 Bing. 722; see *Ex parte Skinner*, 1 Deac. & Ch. 403; *Ex parte Machul*, 1 Rose, 44; *Richardson v. Anderson*, 1 Camp. 43, n.; *Rucker v. Cammeyer*, 1 Esp. 105.) It has been held, that the several statutes of limitation being in *pari materid*, ought to receive an uniform construction, notwithstanding any slight variations of phrase, their object and intention being the same. (5 B. & Ald. 215; see *Ann. Loft*, 398; *Doe d. Tennyson v. Lord Yarborough*, 7 Moore, 258; 1 Bing. 24.) The principle of some of the cases, in *Whippy v. Hillary*, 3 B. & Ad. 399; 5 Carr. & P. 209; *post*, 243; and *Rouledge v. Ramsay*, 8 Ad. & Ell. 221; 3 Rev. & P. 319; *post*, 241; decided upon the stat. 9 Geo. 4, c. 14, although in language different from that of 3 & 4 Will. 4, c. 27, ss. 40, 42, may be applicable to some cases arising under the latter statute. (*Holland v. Clark*, 1 Y. & Coll. N. C. 169.) But other decisions under 9 Geo. 4, c. 14, s. 1, are not applicable to cases arising under the 40th and 42nd sections of 3 & 4 Will. 4, c. 27, for the word agent is omitted in the first section of the former act. (See *Hyde v. Johnson*, 3 Scott, 389; 2 Bing. N. C. 778; *ante*, p. 171; *post*, 230.) Therefore, an acknowledgment of a debt signed by an agent of the debtor will not take the debt out of the operation of that act. All that the act of 3 & 4 Will. 4, c. 27, ss. 40, 42, requires is, that some acknowledgment of the right to the sum claimed shall have been given in writing, signed by the person who represents the estate out of which it is payable, or by his agent. Thus where an estate was devised to a trustee in trust to sell, and pay the testator's debts, and subject thereto in trust for A, an acknowledgment of a debt in writing, signed by the trustee or his agent, was held to be sufficient to preserve the creditor's right of suit for twenty years after the acknowledgment was given; but such an acknowledgment will not impose on the trustee any personal liability to pay the debt. (*Lord St. John v. Baughton*, 9 Sim. 219.)

Acknowledgments under 40th and 42nd sections.

On a bill filed in April, 1840, by a party as administrator of his wife, seeking the recovery of the principal and interest of a legacy of 150*l.* bequeathed to her by a testator who died in 1811. The legatee attained her majority when the legacy vested, and married before the year 1825. In December, 1825, the two executors of the testator gave the plaintiff a written acknowledgment whereby they separately and jointly acknowledged that they owed the plaintiff 150*l.* for the legacy, and 5*l.* interest thereon. It was held to be clear that this document precluded the defendants from all benefit under the 40th section of 3 & 4 Will. 4, c. 27. (*Holland v. Clark*, 1 Y. & Coll. N. C. 151.)

In a case where it was contended that an acknowledgment by the debtor to a third person took a case out of the stat. 3 & 4 Will. 4, c. 27, s. 40, *Alderson B.* said that will not do; there must be that from which a continuing contract may be inferred. If a man were to write a letter to a third person acknowledging the debt, it would not take it out of the sta-

tute. Lord Tenterden's Act, 9 Geo. 4, c. 14, explains that (*Grenfell v. Girdlestone*, 2 Y. & Coll. 676.) It is conceived that this observation must apply where the third party is not the agent of the party claiming the benefit of the acknowledgment. In order that an acknowledgment may have the effect of taking a demand out of the operation of the stat. 3 & 4 Will. 4, c. 27, s. 42, the acknowledgment must appear to have been made with a view of rendering the party making it liable to the demand, and it must have been made to the party entitled to make the demand. (See *Grenfell v. Girdlestone*, 2 Y. & Coll. 676; *ante*, p. 233.) Therefore, where a bill was brought against two executors for payment of a legacy bequeathed to the plaintiff's wife, and for arrears of interest accrued since her death; and the plaintiff, with a view of taking his demand for interest out of the operation of the 42nd section of the statute, relied on certain letters written by one of the executors to his the plaintiff's attorney: it was held, 1st. That the letters had not the effect ascribed to them by the plaintiff, because they had been written by the party not for the purpose of charging himself but of throwing the burden of payment on the co-executor; 2ndly, That even if they had been written for the purpose of charging himself, it was questionable whether they would avail the plaintiff, inasmuch as they were written before the plaintiff had taken out letters of administration to his wife. (*Holland v. Clark*, 1 Y. & Coll. N. S. 151.)

A judgment was obtained on a joint bond and warrant of attorney against A. and B. in 1815; B. had joined in these as a security for A. On the 20th March, 1820, A. wrote to V.'s agent, "You have inclosed 150l. to my credit on account of V.'s interest;" and by the account book kept by V.'s agent (since dead), appeared an entry by the agent of 17 March, 1820, charging himself with a bill for 30l. drawn by A., and 100l. cash from A. In 1822, V.'s attorney applied by letter to B. calling for payment of the amount of the above debt, and B. on that occasion wrote to V.'s attorney, acknowledging the receipt of his letter, "applying for payment of his, B.'s and A.'s joint bond." And soon after B.'s agent wrote a letter to V.'s attorney, enclosing a proposal of terms upon which matters should be arranged by A., and said, "this being done, it is hoped the judgment against B. will be satisfied." The bill was filed in 1839, for an account of the sum due on the judgment: it was held, that it appeared that there was a payment on account of interest, and a sufficient acknowledgment to take the case out of the stat. 3 & 4 Will. 4, c. 27, s. 40, and that the statute was retrospective. (*Vincent v. Willington*, 1 Longfield & T. 456.) It seems that an affidavit made in a suit may be a sufficient acknowledgment within the 42 sect. 3 & 4 Will. 4, c. 27. (*Tristram v. Hartle*, 1 Longfield & Townsend, 186.)

Where certain suits were pending, in which A. and B. were defendants, and a reference was made to the Master to report the incumbrances affecting the freehold lands of A., and

Master's report not an acknowledgment.

amongst others he reported B. a creditor by a judgment affecting them for a certain sum, it was held, that this was not such an acknowledgment in writing by the agent of A. and B. or his agent, as will take the case out of the statute of limitations, the Master's report not being an acknowledgment in writing within the meaning of the act, nor can the Master be deemed an agent. The act contemplates such writing as may be evidence of a right, and the agent such a one as is acting directly under authority. The Master's report is a public document, and not the property of either party; he acts judicially, and the report is his act, and not the act of the suitor; he was appointed by the Lord Chancellor's authority, and his acts are binding, whether he is recognized as the agent or not. (*Hill v. Stawell*, 2 Brady, Adair & Moore, 302; 2 Jebb & Sym. 389.)

The statute of limitations 3 & 4 Will. 4, c. 27, s. 40, may be pleaded to a bill of foreclosure; a foreclosure suit being, in fact, a suit for the recovery of the money secured by the mortgage, although, according to what appears upon the face of the bill, there is nothing to prevent the plaintiffs from bringing an ejectment. (*Dearman v. Wuche*, 9 Sim 570.) A plea of the statute of limitations, 3 & 4 Will. 4, c. 27, ought not to deny by answer statements in the bill, which are in direct contradiction to the averments necessary to support the plea; but an answer in support of the plea ought to be confined to those statements in the bill, which allege facts ancillary to, or as affording evidence of statements which are directly negated by the requisite averments in the plea. (*Dearman v. Wuche*, 9 Sim. 570.) A plea relying upon the 40 section of 3 & 4 Will. 4, c. 27, should both state the commencement of the period of limitation, and negative the cases of exception in that section. A plea was held defective which did not expressly aver that the action was not brought within twenty years next after a present right to receive the sum secured by the judgment had accrued. And it did not in terms aver that a present right to receive the sum secured by the judgment had accrued to the conuzee, or to any other person twenty years before the action brought, or at any specific time. (*Fortescue v. Kane*, 1 Jebb & Symes, 341.) Where a creditor's suit was commenced before the passing of the statute 3 & 4 Will. 4, c. 27, it was held that the claim of a judgment creditor, who subsequently came in and proved his debt in due course under the decree, was unaffected by the operation of that statute. Had it been necessary to make a special application to the court for liberty to prove the debt, grounded upon a denial of the creditor's knowledge of the existence of the suit, it would have been otherwise. (*O'Kelly v. Bodkin*, 2 Ir. Eq. R. 361.)

A defendant who has answered, cannot have the benefit of the statute of limitations at the hearing, unless he has insisted on it by demurrer, plea, or answer. (*Harrison v. Bowell*, 10 Sim. 382.) When it appears on the face of the bill that the

cause of suit accrued more than six years before the filing of the bill, a defendant need not plead the statute of limitations, but may demur. (*Heare v. Peck*, 6 Sim. 51; *Tyson v. Pole*, 3 Y. & Coll. 275; see *Foster v. Hodgson*, 19 Ves. 180; *Earl Deloraine v. Browns*, 3 Br. C. C. 633; and authorities cited by Belt; *Plunket v. Earl of Burlington*, 3 Y. & Coll. 266.) Averments in a plea of the statute of limitations, negating facts that would defeat the plea, but which are not stated in the bill, are surplusage, but do not vitiate the plea. A plea of the statute of limitations need not negative the usual *general* allegation that the defendant has in his custody documents relating to the matters contained in the bill. (*Forbes v. Shelton*, 8 Sim. 335.) It is not competent for a defendant failing in the defence made by his answer to set up another defence dependent upon matters of fact not put in issue by his answer, and which the plaintiff has no opportunity of disproving or explaining. (*Peruse v. Peruse*, 1 West P. C. 110.)

When a defendant seeks to have the advantage of the stat. 3 & 4 Will. 4, c. 27, s. 42, he must in general rely upon it in his pleading. But where a third party (the mortgagee of the person who created the charge, to raise which the bill was filed), omitted to rely upon the statute expressly, but denied the existence of the debt in his answer, in such terms as was considered to amount substantially to a reliance upon the statute, the court would not deprive him of the benefit of the statute; but holding that the question upon the bar of the statute was for the court, and not for the officer, the plaintiff, under the circumstances, was allowed to make out any case he was able before the officer, to bring his claim within either of the exceptions in the act, and the officer was directed to report specially thereon. (*Cummins v. Adams*, 2 Ir. Eq. R. 393.) In the case of *Welsh v. Welsh*, 1 Jones & Carey, 232, it was decided by the Court of Exchequer in Ireland, that a defendant who does not rely on the statute of limitations in his answer, cannot resort to it in his discharge, Lord Chancellor Plunket said as to that decision in the Exchequer, which has been cited, to show that the defence of the statute of limitations could not be set up in the office where it had not been relied on in the answer, "I would require to have that proposition fully considered before I adopted it in its full extent. The consequences to creditors in the administration of assets in the office would be quite alarming. It may be quite right to apply it in a case between plaintiff and defendant, but it seems to me to be impossible to apply it in a case like the present. (*Drought v. Jones*, 2 Ir. Eq. R. 306.)

The statute of limitations, notwithstanding it is a defence at law, may be pleaded to a bill of discovery in aid of an action brought, provided it has been pleaded to the declaration. If the action was commenced before the bill was filed, the plea must aver that the cause of action did not accrue within six years before the action was brought. (*Macgregor v. East India Company*, 2 Sim. 452.)

A plea, pleading first the statute 21 Jac. 1, c. 16, and afterwards the statute 9 Geo. 4, c. 14, is not double, for those acts, although passed at different times, are to be considered as making jointly one law. (*Forbes v. Shelton*, 8 Sim. 335.)

By stat. 21 Jac. 1, c. 16, s. 3, all actions of account and Limitation of actions on simple contract debts. upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded on any lending or contract, without specialty, and all actions of debt for arrears of rent, shall be commenced within six years after the time of action. A similar enactment is contained in the Irish stat. 10 Car. 1, sess. 2, c. 6, s. 8.

From an early period, although the time limited by the stat. 21 Jac. 1, c. 16, had elapsed, the plaintiff was permitted to prove an acknowledgment of, or promise to pay, the debt within six years, which was sufficient to entitle him to recover. (3 Y. & Jerv. 522.)

Many of the clauses in the statute 9 Geo. 4, c. 14, (usually called Lord Tenterden's Act) being analogous in principle to several of the provisions in the 3 & 4 Will. 4, c. 27, and some of the decisions upon the former act being applicable to cases under the latter, it may be convenient to consider the construction of Lord Tenterden's Act. (See ante, p. 233.)

The stat. 9 Geo. 4, c. 14, was made with a view to provide a remedy against the vague and loose verbal promises which had been allowed to take cases out of the statute of limitations. (6 Bing. 264.) That act, after reciting the stat. 21 Jac. 1, c. 16, s. 3, and the Irish stat. 10 Car. 1, sess. 2, c. 6, and that various questions had arisen in actions founded on simple contracts, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking cases out of the operation of the said enactments; and that it was expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof, enacts, "That in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed a sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that, where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any

In actions of debt or upon the case, no acknowledgment shall be deemed sufficient, unless it be in writing, or by part payment.

Proviso for
case of joint
contractors.

person whatsoever: Provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff." (See *post*, 246.)

Indorsements
of payments.

The second section makes provision as to pleas in abatement. The third section enacts, "that no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes."

Simple contract debts,
alleged by
way of set-off.

The fourth section enacts, "that the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise."

Construction of
Lord
Tenterden's
Act.

The intention of the last statute was not to make any alteration in the legal construction to be put upon acknowledgments or promises made by debtors, but merely to require a different mode of proof, substituting the certain evidence of writing, signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses. The inquiry, therefore, in a given case, whether the written document amounts to an acknowledgment or a promise, is no other than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar effect. (*Haydon v. Williams*, 7 Bing. 163; 4 M. & P. 811.)

Part payment.

Since Lord Tenterden's act, after the six years have elapsed, nothing will revive the debt, except an acknowledgment in writing, from which a promise to pay can be inferred, or a part payment of principal or interest. Now there have been several cases in which it has been considered, after much discussion, and adopted by all the courts, that the payment must appear, either by the declarations or acts of the party making it, or by the appropriation of the party in whose favour it is made, to be made in part payment of the debt in question: if it stands ambiguous whether it be part payment of an existing debt, or payment generally, without the admission of any greater debt as due to the party;—if it may have been made by the party paying in reduction of an account due to himself, or intended to satisfy the whole of the demand against him, then it is not sufficient to bar the statute of limitations. (Per Lord Abinger, *C. B. Waugh v. Cope*, 6 Mees. & W. 829.) Under

the 9 Geo. 4, c. 14, s. 1, an acknowledgment signed by the agent of the debtor will not revive a debt barred by the statute of limitations 21 Jac. 1, c. 16, but it must be signed by the debtor himself. *Tindal*, C. J. said, "The legislature has, in many statutes given equal efficacy to written instruments when signed by the parties and when signed by their agents; but in all those cases express words have been employed for that purpose. The statute of frauds, in its third section, requires for the purposes of that section, a note in writing to be signed by the party, 'or their agents thereunto lawfully authorized by writing:' in the fourth section a memorandum or note in writing is required, 'signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized: in the fifth section a devise of lands is required to be made in writing to be 'signed by the party so devising, or by some other person, in his presence, and by his express directions: in the seventh section a declaration of trusts of any lands shall be in writing, 'signed by the party: and lastly, the seventeenth section requires upon the sale of goods, that there shall be some note or memorandum in writing of the bargain, 'signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.' It appears, therefore, that the legislature well knew how to express the distinction, not only between a signature by the party, and a signature by his agent; but also to describe the different mode by which agents for different purposes are to be appointed. The same observation arises upon referring to the more recent statutes, 3 & 4 Will. 4, c. 27, s. 42, and c. 42, s. 5. When, therefore, we find in the statute now under consideration, that it expressly mentions the signature by the party only, we think it a safer construction to adhere to the precise words of the statute, and that we should be legislating not interpreting, if we extended its operation to writings signed, not by the party chargeable thereby, but by his agent. And we feel ourselves the more compelled to adopt this construction, as we find the seventh section of the same statute recites the seventeenth section of the statute of frauds, so that the legislature must have had in their view at the very time of passing this statute, and therefore must have intended, the distinction between writings signed by a party or signed by his agent." (*Hyde v. Johnson*, 2 Bing. N. C. 778—780; 3 Scott, 389.)

Acknowledgment must be signed by party.

If, since the stat. 9 Geo. 4, c. 14, a defendant, by a letter, admits a balance to be due, without stating the amount, this will take the case out of the statute of limitations, so as to entitle the plaintiff to nominal damages. (*Dickenson v. Hatfield*, 5 Carr. & Payne, 46; S. C. 2 M. & M. 141.) A general promise in writing, not specifying the amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient to take the case out of the operation of the statute of limitations. These words in a letter were held a sufficient acknowledgment to revive a debt barred by the statute of limitations: "I wish I could comply with your request, for I

am very wretched on account of your account not being paid; there is a prospect of an abundant harvest, which must turn into a goodly sum, and considerably reduce your account; if it does not, the concern must be broken up to meet it; my hope is, that out of the present harvest you will be paid" (*Bird v. Gammon*, 3 Bing. N. C. 883; 5 Scott, 213.) In another case the defendant had a claim against his attorney the plaintiff, the amount of which was not ascertained; at the foot of his bill the plaintiff acknowledged the debt thus: "By Mr. Lacy's bill," leaving a blank for the sum; it was held that this was a sufficient acknowledgment to take the defendant's claim out of the statute of limitations. (*Waller v. Lacy*, 1 Scott, N. R. 186; 8 Dowl. 563; 1 Mann. & G. 54.) Where a deed executed by A. and B. recited that A. was indebted to B. in various sums, the amount of which was not yet ascertained, and a balance not yet struck; and that A. was willing to pay B. the amount which might appear to be due to B. in respect of such sums, such amount to be ascertained and paid as thereafter mentioned, and the deed afterwards provided for taking the accounts by the arbitration of two persons named in the deed: it was held that, notwithstanding the clause as to arbitration, the recitals amounted to an absolute promise to pay the amount when ascertained; and that, when coupled with extrinsic parol evidence as to the amount, they were sufficient, consistently with stat. 9 Geo. 4, c. 14, to take the debt out of the statute of limitations. (*Cheslyn v. Dalby*, 4 You. & C. 238.) In assumpsit on a bill of exchange, a letter was produced to take the case out of the statute of limitations, from the defendant to the plaintiff, stating that the plaintiff should be informed, immediately it was settled, how the defendant's affairs should be arranged; adding, "Your account is quite correct, and, oh! that I were now going to inclose the amount." No amount of debt was stated, and no proof was given, from the letter or otherwise, to what account the letter referred, nor whether the letter applied to the bill. It being left to the jury to say whether this was an unconditional acknowledgment of the debt, and they having found that it was, it was held that there was no ground for a nonsuit; for that the acknowledgment was unconditional; and that the jury, if it was a question for them, had decided it rightly. (*Dodson v. Mackay*, 8 Ad. & El. 225, n.) But it seems that when a written acknowledgment does not state the amount due, there can only be nominal damages; (*Id.*; see *Lechmere v. Fletcher*, 1 Cr. & M. 623; 3 Tyr. 450; *Dabbs v. Humphries*, 10 Bing. 446; 4 M. & Scott, 285;) unless there be proof *aliunde* of the amount due. (*Dickenson v. Hatfield*, 5 Carr. & P. 46.) A promise in writing, signed by the party chargeable thereby, to pay his proportion of a joint debt of more than six years standing, was held sufficient, within the stat. 9 Geo. 4, c. 14, s. 1, to take the case out of the statute of limitations, though no amount was stated, and to entitle the plaintiff to recover the whole of such proportion proved by extrinsic evidence.

(*Leckmere and others v. Fletcher*, 1 Cr. & Mees. 623; *Waller v. Lacy*, 1 Scott, N. R. 186; 8 Dowl. P. C. 563; 1 Mann. & G. 54.) An answer and inventory in the Ecclesiastical Court, made on the citation of the next of kin, stating the debts due from the estate of the deceased, and signed by the administrator, is sufficient to take such debts out of the statute of limitations, 21 Jac. 1, c. 16; 9 Geo. 4, c. 14. (*Smith v. Paine*, 10 Law Journ. N. S. Chancery, 192.) No memorandum or other writing made necessary by 9 Geo. 4, c. 14, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps. (9 Geo. 4, c. 14, s. 8.) Under this section the following memorandum, "I acknowledge to owe M. £36, which I agree to pay him as soon as circumstances will permit," is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the statute of limitations, the debt itself being proved by other evidence. (*Morris v. Dixon*, 4 Ad. & El. 845.) When the parties mean to make an instrument solely to prevent the operation of 9 Geo. 4, c. 14, they must take care not to import into it terms which will make it liable to stamp duty as a promissory note. A promissory note, improperly stamped, is not admissible as a memorandum to take a case out of the statute of limitations under the 9 Geo. 4, c. 14, s. 8; that section applies only to instruments which might be stamped with an agreement stamp. (*Jones v. Ryder*, 4 Mees. & W. 32.) An acknowledgment, without anything more, may raise an implied promise since the stat. 9 Geo. 4, c. 14, as it did before; but where something else is added, that must be taken into consideration. A debtor having sums due to him, handed the accounts to his creditor, and wrote, "I give the above accounts to you, so you must collect them and pay yourself, and I will then be clear," and added his signature. It was held that this acknowledgment did not imply a promise to pay, and was no answer under the statute 9 Geo. 4, c. 14, to a plea of the statute of limitations. (*Routledge v. Ramsey*, 8 Ad. & El. 221; 3 Nev. & P. 319.) Whether such a written acknowledgment be conditional or unconditional, is a question for the court, not the jury (*Id.*), except where the document is connected with other evidence affecting the construction. (*Morrell v. Frith*, 3 Mees. & W. 402; *Bird v. Gammon*, 3 Bing. N. C. 883; *Power v. Barham*, 4 Ad. & El. 473; 1 M. & R. 507.) A party being written to by the plaintiff's attorney for payment of an alleged debt due for more than six years, wrote an answer, in which he stated that he was "in almost daily expectation of being enabled to give a satisfactory reply" to the application, and that he would call on the plaintiff's attorney "on the matter;" it was held that this was not sufficient to take the case out of the statute of limitations. (*Morrell v. Frith*, 8 Carr. & P. 246.) Where a local turnpike act provided that all orders of the trustees should be entered in a book kept for that purpose, an

Memorandum exempted from stamp duty.

What acknowledgments are not sufficient.

order by them to pay a bill is not an act done so as to take debt out of the statute of limitations under 9 Geo. 4, c. 1, unless it be so entered in writing; the only act capable of taking a case out of the statute being the payment of principal or interest. (*Emery v. Day*, 1 C. M. & R. 246; 4 Tyr. 695) If a payment may have been made by a party paying to the credit of an account due to himself, or with the intention of satisfying the whole of the demand against him, it is not sufficient to bar the statute of limitations; there must be a distinct admission of an existing debt, of which the payment was payment in part. The plaintiff and attorney had done professional business of various kinds for the defendant in 1827, and several subsequent years. In July, 1832, the defendant having been a witness on a lunacy inquiry, in which the plaintiff was concerned as solicitor, the plaintiff wrote to him to ask what were his expenses on that occasion. The defendant, in reply, requested the plaintiff to allow what was usual, and place the same to his (the defendant's) account. In March, 1833, the plaintiff wrote to the defendant, informing him that the sums allowed were £2:2s. and 10s. 6d., inclosing receipts for those sums for the defendant's signature, and concluding, "I will give you credit for the sums in my account against you, agreeably to your note of the 21st July last." The defendant returned the receipts signed by him, and the £2:2s. and 10s. 6d. were paid to the plaintiff on the production of those receipts. In 1831 the plaintiff delivered to the defendant a bill of costs, amounting to £269, the first item being in 1827, and the two last in 1830 and 1831. These two were charges for £3 and £5 each lent, the rest of the bill was for professional business. In an action on this bill commenced in June, 1839, it was held that the letters given in evidence did not sufficiently show that the £2:2s. and 10s. 6d., were paid in discharge of the debt for which the action was brought, so as to take the case out of the statute of limitations as to any part of the demand. (*Waight v. Cope*, 6 Mee. & W. 824.) A deed of composition, by which, after reciting that the defendant was indebted to the plaintiff and others, the former assigned his property to the plaintiff, in trust to sell and to pay all such creditors as should sign the schedule of debts annexed, but which was neither signed by the plaintiff nor specified the amount of his debt, and had become void under a proviso, was held not to be evidence of a promise, nor an acknowledgment in writing within the stat. 9 Geo. 4, c. 14; for the acknowledgment was only of some debt, but what remained to be made out by parol evidence. (*Kennett v. Milbank*, 8 Bing. 38; 1 M. & Sc. 102.) The statute of limitations is not barred by a letter in which the defendant states "that family arrangements have been making to enable him to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; and that the defendant has handed the plaintiff's account to A.; and that some time must elapse before payment, but that the defendant is authorized by A. to refer the plaintiff to him for any further information;" for, by

the stat. 9 Geo. 4, c. 14, s. 1, the acknowledgment in writing, to bar the statute, must be signed by the party chargeable thereby, and such letter does not charge the defendant. (*Whippy and another v. Hillary*, 3 B. & Ad. 399; 5 C. & P. 209.) In order to take a case out of the statute of limitations, a letter from the defendant to the plaintiff was put in, containing the following words: "I shall be most happy to pay you both interest and principal as soon as convenient;" and in a subsequent part "I shall pay no more interest till we have a fair settling." Other letters of the defendant acknowledged a debt, but spoke of a settling between him and the plaintiff. It was held that, in order to enable the plaintiff to recover, some evidence must be given that a time had arrived when it was convenient to the defendant to pay; and, as it seems, that the settlement alluded to had taken place between the parties. (*Edmunds v. Downes*, 4 Tyrw. 173; 2 C. & M. 459.)

A mere acknowledgment is not sufficient to take a case out of the statute of limitations, unless there be a promise to pay; upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be implied; but where the party guards his acknowledgment, an implication will not arise. (*Tanner v. Smart*, 6 B. & C. 603; 8 C. 9 Dowl. & Ry. 549.) A mere acknowledgment, though it may, under circumstances, amount to a new promise, yet if it does not, it is not a sufficient answer to the statute of limitations. (*Fearn v. Lewis*, 4 Moore & P. 1; S. C. 6 Bing. 349; *Scales v. Jacob*, 11 B. Moore, 563; S. C. 3 Bing. 628; *Ayton v. Bolt*, 12 B. Moore, 305; S. C. 4 Bing. 105.) And therefore a letter acknowledging that the plaintiff made a demand, but not acknowledging the propriety of the demand, and denying all liability on the defendant's part to make the payment, was held not to raise an implication of a promise to pay. (*Brigstocke v. Smith*, 1 Cr. & Mees. 483.)

Where a written promise to pay a debt barred by the statute of limitations has been lost, parol evidence of the contents of the writing is admissible. (*Haydon v. Williams*, 7 Bing. 163; 4 M. & P. 811.) But it is doubtful whether the date of the written acknowledgment can be supplied by oral evidence. (*Edmunds v. Downes*, 4 Tyrw. 173; 2 Cr. & M. 459.)

The promise given in evidence, under the general replication to the statute of limitations, must be consistent with the promises laid in the declaration, and consequently evidence of a conditional promise will not support an absolute promise in the declaration. (*Tanner v. Smart*, 6 B. & C. 603; 9 D. & R. 549.) For where an action is brought after the six years, and the subsequent acknowledgment of the defendant is the very ground of action, the plaintiff must take it altogether as he finds it, and cannot use the acknowledgment without annexing the qualification also. (*Haydon v. Williams*, 7 Bing. 168; 4 M. & P. 811.)

In order to take a case out of the statute of limitations by a

Part payment
of principal
or interest.

part payment, it must appear, in the first place, that the payment was made on account of a debt; secondly, that the payment was made on account of the debt for which the action is brought; and, thirdly, that the payment was made of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the payment. (*Tippets v. Heane*, 1 C. M. & R. 252.) The meaning of *part payment* of the principal, is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum*, due from the person making the payment to him to whom it is made; which part payment implies an admission of such greater sum being then due, and a promise to pay it; and the reason why the effect of such a payment is not lessened by the act 9 Geo. 4, c. 14, is, that it is not a mere acknowledgment *by words*, but it is coupled with a fact. (*Waters v. Tompkins*, 2 Cr. M. & R. 726.) Since the stat. 9 Geo. 4, c. 14, the payment within six years of interest which had become due upon a note, beyond that period, has been held sufficient to take the case out of the statute of limitations, where the note remained in the hands of the payee. (*Bealy v. Greenslade*, 2 Tyrw. 121; 2 C. & J. 61; 1 Price, P. C. 144.) So also was payment of interest within six years, by one of the several makers of a joint and several promissory note. (*Wyatt v. Hodson*, 1 M. & Scott, 442; 8 Bing. 309.) Payment of part of the principal or interest is evidence of the subsistence of the debt, and shows that the payee has a demand against the party who makes the payment; but a verbal acknowledgment of the payment of part of a debt within six years was held not sufficient within the stat. 9 Geo. 4, c. 14, to take the case out of the statute of limitations; as the previous enactment must be engrafted upon the proviso as to part payment, and the whole must be taken together and the payment proved, not by a verbal acknowledgment, but by evidence of the actual payment, or by writing such as the act requires; and being so proved it will have the same effect as it had before the passing of the act. (*Willis v. Newham*, 3 Y. & J. 518.) In assumpsit on a promissory note bearing interest, proof that the defendant being sent to by the plaintiff for money, paid £1, and said, "this puts us straight for last year's interest, all but 18s.; some day next week I will bring that up," is sufficient answer to a plea of the statute of limitations, no evidence being given of any other debt due from the defendant to the plaintiff. (*Evans v. Davies*, 4 Ad. & El. 840; 3 Dowl. P. C. 786; 1 Gale, 160.) If an equitable mortgagee enters into the receipt of the rents of the mortgaged estate, such receipt is *prima facie* a payment within the meaning of the proviso in the stat. 9 Geo. 4, c. 14, s. 1. (*Brocklehurst v. Jessop*, 7 Sim. 438.) Any thing received upon an agreement, in reduction of a debt, is a payment within 9 Geo. 4, c. 14, s. 1, sufficient to take the debt out of the statute of limitations. (*Hooper v. Stephens*, 4 Ad. & El. 71; 7 C. & P. 260; *Hart v. Nash*, 2 Cr. M.

& R. 337.) If the parties to a bill of exchange agree that goods shall be supplied in part payment, and they are supplied and taken accordingly, that is part payment so as to prevent the operation of the statute of limitations. (*Hart v. Ash*, 2 Cr. M. & R. 337.) Since Lord Tenterden's act there must be part payment in cash, or what is equivalent to it, to take a case out of the statute of limitations. A. occupied a house and land under B. at the rent of £16 a year, and A., at B.'s request, entered into his employment as a farming bailiff, and to perform other services, in the place of another person who had been employed by B. and had been paid 12s. a week. A. continued in B.'s service for more than twelve years, but there was no payment of rent on the one hand, or of wages on the other. In an action brought by A. to recover wages for twelve years, deducting the rent, it was held that this was not such an open account as would take the case out of the statute of limitations since the 9 Geo. 4, c. 14, but that there must be a part payment in cash, or what is equivalent to it, to have that effect. (*Williams v. Griffiths*, 2 Cr. M. & R. 45.) Where a debtor draws a bill of exchange, to be applied in part payment of the debt, and the bill is paid when due, by the drawee to the creditor, it operates as a part payment, to defeat the statute of limitations, only from the time of the delivery of the bill by the debtor, not from the time of its payment. (*Irving v. Veitch*, 3 Mee. & W. 90.) A witness, who said he settled all kinds of accounts for the defendant, admitted that an account containing a memorandum of a payment on the part of the defendant was in his own handwriting, but said he could not recollect the fact of payment; it was held, nevertheless, that there was sufficient evidence to go to a jury, as to the fact of payment, to take the case out of the statute of limitations. (*Trentham v. Deverill*, 3 Bing. N. C. 397; 4 Scott, 128.) The defendant was indebted to the plaintiffs in a balance of £2245, for which they held his overdue promissory note. In 1827, the plaintiffs and the defendant agreed that the defendant should pay the balance as follows: £245 in cash, and the remainder by annual payments of £300 a year, out of his salary as a consul abroad, and by the proceeds of certain wines consigned by him to India; and that the plaintiffs should hold his promissory note as a security for the payment of the amount. The £245 was paid, and the £300 was also duly paid in 1828 and 1829, but the defendant made default in payment of it in September, 1830; it was held that the plaintiffs were entitled, at any time within six years from September, 1830, to sue the defendant on the promissory note, or for the balance remaining due, on a count upon an account stated. (*Irving v. Veitch*, 3 Mee. & W. 90.) An acknowledgment of part payment by a defendant to take a debt out of the statute of limitations, under 9 Geo. 4, c. 14, s. 1, must not only be in writing, but be signed by him. (*Bayley v. Ashton*, 4 Perry & Dav. 204. See *Trentham v. Deverill*, 3 Bing. N. C. 397; *Willis v. Newham*, 3 Y. & J. 519.) Under the statute the part payment must

Case of joint
contractors.

Confirmation
of promises
made by
infants.

be proved either by direct evidence of it as a substantive fact, or by the acknowledgment of the party to be charged; and, if the mode of proof is by such acknowledgment, it must be in writing, and signed by him on the footing of any other acknowledgment under the statute. (*Per Littledale*, 4 P. & Dav. 206.) A verbal acknowledgment by the debtor, within six years of the part payment of a debt, is not sufficient to take the case out of the statute of limitations. (*Maghee v. O'Neil*, 7 Mee. & W. 531.) It has been decided, where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representatives of the other to take the debt out of the statute as against the survivor; as where, after the death of one maker of a joint and several promissory note, signed by two, a payment upon it by the executor of the deceased party will not take the debt out of the statute of limitations as against the survivor. (*Slater v. Lawson*, 1 B. & Ad. 396; 2 B. & C. 25; 8 B. & C. 36.) Payment of interest by one of the makers of a joint and several promissory note, though made more than six years after it became due, is sufficient to take the case out of the statute of limitations as against the other maker, although such payment was made after the statute had run. (*Channell v. Ditchburn*, 5 M. & Wels. 494. See *Atkins v. Tredgold*, 2 B. & C. 23; 3 Dowl. & R. 200; *Slater v. Lawson*, 1 B. & Ad. 396; *Burleigh v. Stott*, 8 B. & C. 36; 2 M. & Ry. 93; *Whitcomb v. Whiting*, Dougl. 652; *Munderston v. Robertson*, 4 Man. & R. 440. See cases cited 5 M. & W. 498, n.) If a debtor, A., give as security a note of himself and another, B., a payment on behalf of B., after the statute has begun to run, revives the debt as against A. (*Ex parte Woodman*, 3 Mont. & A. 609. See *id.* 615.) After the death of one of two partners, the survivor cannot set up the statute of limitations as a bar to a demand against the assets of the deceased. It seems questionable whether the deceased's representatives can set up the statute so long as the survivor continues liable to the payment of the debt, and the deceased's estate is consequently liable to be called upon by the survivor for contribution. (*Winter v. Innes*, 4 M. & Cr. 101, 111. See *Braithwaite v. Britain*, 1 Keen, 206, 221.) No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith; 9 Geo. 4, c. 14, s. 5. In an action of debt for goods sold and delivered; plea infancy; replication that the defendant ratified the contract in writing, signed by him after coming of age. Issue thereon. The plaintiff produced the following paper, signed by the defendant: "I am sorry to give you so much trouble in calling; but I am not prepared for you, but will, without neglect, remit you in a short time." The paper had no address or date, and specified no sum; but

it was proved orally that the defendant delivered it to the plaintiff's agent on being pressed for the debt, the amount of which was also proved by oral evidence. This was held sufficient to satisfy the statute 9 Geo. 4, c. 14, s. 5. No evidence was given to show whether the defendant was of age or not when he delivered the paper: it was held that the plaintiff must recover; the defendant, if he relied on his infancy at the time, being bound to prove it. (*Hertley v. Wharton*, 11 Ad. & Ell. 934; 3 P. & Dav. 529. As to second point, see *Borthwick v. Carruthers*, 1 T. R. 648; *Bates v. Wells*, 1 Stark. Ev. 463, 2nd ed.)

Where a suit had been actually commenced within six years after the cause of action, continuances might formerly have been entered at any time, for the purpose of avoiding the plea of the statute of limitations. (*Beardmore v. Rattenbury*, 5 B. & Ald. 452; *Taylor v. Gregory*, 2 B. & Ad. 257; see 2 Wms. Saund. 63, c. n.) The stat. 2 & 3 Will. 4, c. 39, s. 10, for establishing uniformity of process in personal actions in the courts at Westminster, enacts, "that no writ issued by authority of that act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date; but every writ of summons and capias may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon, or served therewith: Provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ; and return to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be."

Entering continuances.

Where a writ of summons tested in time to save the statute of limitations was resealed in consequence of an alteration in the description of the defendant and the county in which he resided, and it was not served until after the six years had expired, it was held that the resealing did not amount to a renewing of the writ, and that it was not necessary for the plaintiff to show when the resealing took place. (*Braithwaite v. Lord Montford*, 2 Cr. & Mees. 408.) A bill of Middlesex was a good continuance of a latitat, in order to save the statute of limitations. (*French v. Mawood*, 3 Dowl. P. C. 565.)

The court will not allow process to be served at the house of the agent of a defendant out of the jurisdiction, in order to save the statute of limitations, but the plaintiff must proceed according to the provisions of the 2 & 3 Will. 4, c. 39, s. 10. (*Frith v. Lord Donegal*, 2 Dowl. P. C. 527.)

The proviso in the 10th section of the 2 & 3 Wm. 4, c. 39, as to an *alias* or *pluries* issuing within a month from the expiration of the preceding writ, only applies to cases where it is sought to prevent the operation of some statute of limitation. (*Nicholson v. Rows*, 2 C. & M. 469.) In ordinary cases the *alias* or *pluries* may be sued out at any time, and the continuances, if necessary, may be entered (as formerly) at any time. (*Id.*) A plea of the statute of limitations stated that the cause of action did not accrue within six years next before the commencement of the suit: the plaintiff replied that the cause of action did accrue within six years, &c.: it was held, that without specially replying process issued, the plaintiff might, on the above replication, prove a *quo minus* to have issued within the six years, and produce the roll to show the continuances regularly entered up accordingly. (*Dickenson v. Teague*, 1 C. M. & R. 241; 4 Tyrw. 450.) If continuances are regularly entered upon the roll, the court will not look at any thing in order to contradict the roll, e.g. a writ produced to show that a second writ, an *alias*, was tested on a day subsequent to the return day of the first. (*Id.*) Since 2 & 3 Will. 4, c. 39, s. 10, it is not necessary to serve or endeavour to serve a writ which is issued to avoid the effect of the statute of limitations; it is sufficient to return it *non est inventus*, and enter it of record. (*Williams v. Roberts*, 1 C. M. & R. 676; 3 Dowl. P. C. 513; 5 Tyrw. 421; 1 Gale, 56.) But the expense of such of the writs as are unnecessarily issued will not be allowed to the plaintiff. (*Id.*)

The stat. 2 & 3 Will. 4, c. 39, s. 10, does not apply by analogy to proceedings in equity. (*Coppin v. Gray*, 11 Law Journ. N. S. Ch. 105.)

**Presumption
of payment.**

Before the act 3 & 4 Will. 4, c. 27, it seems that if the mortgagor continued in possession, and there had been neither payment nor demand of any principal or interest for twenty years, that it was sufficient to raise the presumption of payment; (1 Ch. R. 59, 105; *Trash v. White*, 3 Br. C. C. 289; *Christopher v. Sparke*, 2 Jac. & Walk. 228; *Cooke v. Soltau*, 2 Sim. & Stu. 154; contra *Joptis v. Baker*, 2 Cox, 118; *Leman v. Newnham*, 1 Ves. sen. 51;) but such presumption was liable to be rebutted by circumstances, and payment of interest on part of the debt was sufficient to keep the whole alive. (*Lefrus v. Smith*, 2 Sch. & Lef. 642.)

Of judgments.

If a judgment creditor has lain by for twenty years without any effort to enforce his judgment, and it has not been acknowledged by the debtor within that time, it will be presumed to be satisfied. (Peake's Ev. 25, n.; Coote on Mortgages, p. 76. See 4 Ann. c. 16, s. 12; *Kemys v. Ruscomb*, 2 Atk. 45.)

It was held that the presumption arising from lapse of time of a judgment having been satisfied, was not rebutted by evidence of the debtor having been in extremely embarrassed circumstances, and, in the opinion of those who knew him, incapable of paying the debt secured by the judgment. (*Williams v. Gorges*, 1 Campb. 217.) Upon a bill filed by a creditor to enforce a judgment of twenty-eight years' standing, the plaintiff, in order to rebut the presumption that the judgment had been satisfied, gave evidence of the insolvency of his debtor during a great part of that period: it was held, that such evidence would not avail the plaintiff against the unexplained fact of his not having sooner attempted to enforce the judgment, and that, to obtain relief in equity, he was bound under the circumstances to show to demonstration that the judgment had been satisfied. (*Grenfell v. Girdlestone*, 2 You. & Coll. 662; see *White v. Parnter*, 1 Knapp, 228, 229.)

By the Irish stat. 8 Geo. 1, c. 4, s. 2, in any action or suit either in law or equity, for recovery of any debt due by single bill or bond under hand and seal, or by judgment, statute staple, statute merchant, or recognizance, due and payable twenty years before such action or suit brought, where no action or suit had been prosecuted for recovery thereof, nor any interest or money had been paid, or other satisfaction made on account thereof, within twenty years before the commencement of such action or suit, the defendant might plead payment in bar; which plea was to be effectual, unless the plaintiff or those under whom he claimed had commenced or prosecuted some action or suit for the recovery of such debt or debts, or should prove that some interest or money had been paid, or other satisfaction made on account thereof, within twenty years before such action or suit commenced. The sixth section of the act contains a saving in favour of any persons being a feme covert, or within the age of twenty-one years, *non compos mentis*, or in prison, or out of the kingdom, or their representatives, commencing their actions or suits within five years after the removal of their respective disabilities. A promise by the cosutor of a judgment to pay the amount thereof, made within twenty years next before the issuing of a *scire facias* thereon, was held not sufficient to prevent the operation of the last act where the judgment was more than twenty years old. (*Maddock v. Bond*, Ir. T. R. 332.) But a decree establishing a charge was carried into execution, though not proceeded on for forty years, where there was an acknowledgment within twenty years of the subsistence of the charge, and where it appeared that one party had been persuaded not to prosecute his claim by the other holding out promises to pay, which was considered a fraud. (1 Ball & B. 173.)

Upon a plea of payment (under the above statute, 8 Geo. 1, c. 4) to a *scire facias* on a judgment, it was held, 1st, That a charge filed by the creditor before a Master in Chancery, in

the matter of the debtor, a lunatic, (upon a reference obtained by the committee for taking an account of the debts of the lunatic,) was a proceeding by "action" or "suit" within twenty years, within the meaning of the above act, so as to save the bar of that statute; 2dly, That either the commencement or the prosecution of an action or suit within twenty years was sufficient for that purpose. (*Smith v. Creagh, Batty, 384.*) Payment of interest by or proceedings taken against the principal in a joint and several bond within twenty years, will prevent the right of the obligee being barred as against the surety or his representative, upon a plea of payment by the latter, under 8 Geo. 1, c. 4. (*O'Shea v. Warrens, 1 Jebb & Symes, 504.*) The most important difference between the wording of the 40 sect. of 3 & 4 Will. 4, c. 27, and the 8 Geo. 1, c. 4, s. 2, is this,—that the former provides for the case of there having been an *acknowledgment in writing* in the mean time, (that is between the accruing of the present right, and the action brought,) but does not provide for the case of a *proceeding having been taken* in the mean time. The latter provides for the case of a *proceeding having been taken*, not in the mean time, but within twenty years before action; and does not provide for the case of an acknowledgment in writing. The fact of a "proceeding having been taken" within twenty years, is not sufficient to prevent a judgment from being barred under the 40th section of 3 & 4 Will. 4, c. 27, as against the heir and terretenants of the cognizor, that act having in effect repealed that part of the 8 Geo. 1, c. 4, which relates to a proceeding having been taken. (*Irwin v. Ormsby, 2 Jebb & Symes, 91.*) It seems that the stat. 3 & 4 Will. 4, c. 27, has tacitly repealed 8 Geo. 1, c. 4, so that the mere prosecution of a suit within the twenty years no longer prevents the bar from applying. (2 Jebb & Symes, 128; see *Vincent v. Willington, 1 Longfield & T. 466.*)

Lien for purchase money unpaid.

Where a vendor delivers possession of an estate to a purchaser without receiving the purchase-money, equity, whether the estate be (*Chapman v. Tanner, 1 Vern. 267; Pollexfen v. Moore, 3 Atk. 272*; and see 1 Br. C. C. 302, 424, and 6 Ves. jun. 483; *Mackreth v. Symmons, 15 Ves. 329.*) or be not (*Smith v. Hibbard, 2 Dick. 730; Charles v. Andrews, 9 Mod. 152.*) conveyed, and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold, (*Winter v. Lord Anson, 3 Russ. 488.*) gives the vendor a lien on the land for the money. So, on the other hand, if the vendor cannot make a title, and the purchaser has paid any part of the purchase-money, it seems that he has a lien for it on the estate, although he may have taken a distinct security for the money advanced. (*Lacom v. Martins, 3 Atk. 1*; see 3 Sugd. V. & P. 183, 10th ed.) But it seems that there will be no lien for money paid where the contract is illegal by statute. (*Ewing v. Osbaldiston, 2 M. & Cr. 88.*) And in those cases in which the lien would subsist as between

vendor and vendee, the vendor shall have the lien against a third person, who had notice that the money was not paid. (*Mackreth v. Symmons*, 15 Ves. 349; 3 Atk. 373, *contra*.)

But this implied contract may be rebutted by clear and irreconcilable evidence, showing the intention of the parties that the estate shall not be a security for the money. (*Mackreth v. Symmons*, 15 Ves. 329; see 16 Ves. 278.) The lien may subsist notwithstanding a personal security is given for the money, whether by bond, bill of exchange, (*Hughes v. Kearney*, 1 Sch. & Lef. 132; *Grant v. Mills*, 2 Ves. & B. 309; *Ex parte Peake*, 1 Madd. 346,) or promissory note, (*Gibbons v. Baddall*, 2 Eq. Cas. Abr. 682, n. b.)

The taking drafts which are dishonoured will not *per se* deprive the vendor of his right of lien. (*Hughes v. Kearney*, 1 Sch. & Lef. 136; see *Grant v. Mills*, 2 Ves. & B. 306.) The right of lien applies also where the vendee becomes a bankrupt, against his assignees. (*Ex parte Peake*, 1 Madd. 346.)

By an agreement for the sale of an estate, the purchase-money, with interest, was to be secured by the bond of the purchaser, and was to remain so secured during the life of the vendor. The conveyance, which was afterwards executed, expressed that the purchase-money had been paid, and the vendor's receipt was indorsed upon it; but, in fact, only a part of the price had been paid, and the residue was secured by the purchaser's bond, conditioned for payment of the principal with interest, within twelve months after the death of the vendor, and of interest in the meantime. The vendor was held to have a lien on the estate for the amount of the bond. (*Winter v. Lord Anson*, 1 Sim. & Stu. 488; S. C. 3 Russ. 488.) A vendor was held not to have waived his lien on the estate sold, by taking the promissory note of the vendee, and receiving its amount by discount. (*Ex parte Loaring*, 2 Rose, 79.)

Where there is no special agreement extinguishing the lien, the question is, what was the intention of the parties. Lord Eldon observes, (*Mackreth v. Symmons*, 15 Ves. 350,) "the more modern authorities upon this subject have brought it to this inconvenient state: that the question is not a dry question upon the fact, whether a security was taken, but it depends upon the circumstances of each case, whether the court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken."

A mortgage of other lands for the whole or part of the purchase-money, (*Nairn v. Prouse*, 6 Ves. 752,) or a mortgage of the purchased estate for part of the purchase-money, permitting the rest to remain on personal security, (*Bond v. Kent*, 2 Vern. 281; 1 Sch. & Lef. 135,) has also been thought sufficient for the purpose of discharging the equitable lien on the purchased estate in the first instance, or wholly, and in the second instance to the amount of the money remaining on the

personal security, although Lord Eldon seems to have held the former not conclusive. (15 Ves. 341.)

A covenant between the vendor and purchaser, that the purchase-money should be repaid within two years after resale, discharges the vendor's lien. (*Ex parte Parkes*, 1 Glyn & J. 228.) So where the consideration for the conveyance is expressed to be the covenant for the payment of an annuity and a sum in gross. (*Clarke v. Royle*, 3 Sim. 499; see *Stuart v. Ferguson*, 1 Hayes, 452.) A vendor who has taken, as a security for part of the purchase-money, the bond of the vendee, and a mortgage of part of the property sold, cannot, on the bankruptcy of the vendee, establish a lien on the entire estate. (*Capper v. Spottiswoode*, 1 Taml. 21; and see *Blackburn v. Gregson*, 1 Cox, 90.) The mere security for the payment of the price stated in a conveyance will not discharge the vendor's lien. The security is considered as simply for payment of the price, and if the price be not paid the lien subsists. The proper way of deciding questions of this kind is to look at the instruments executed by the parties, and to declare upon such instruments what the intention of the parties was. (*Winter v. Lord Anson*, 3 Russ. 488.) Thus where a vendor, in lieu of the price of 3000*l.*, agreed to accept an annuity of 100*l.* a year for the joint lives of her intended husband and herself, in case the purchasers should so long live, the purchaser engaging that his personal representatives should within three months after his decease, in certain events but not in all events, pay a further sum of 3000*l.*; this is not a security, but a substitution for the price, and the lien of the vendor is discharged. (*Parrott v. Sweetland*, 3 Myl. & Keen, 655.)

The lien of a vendor upon the land and upon the title-deeds, until the purchase-money be paid him, does not apply to a conveyance to the purchaser executed by some but not all the parties, where the contract has gone off by the vendor's default; and if there be any lien on such conveyance, it is vested in the purchaser as a security for his deposit. (*Oxenham v. Esdaile*, 3 Y. & J. 262; S. C. 2 Y. & J. 493.)

A party who executes a deed is estopped in a court of law from saying that the facts stated in that deed are not truly stated. Therefore, where the whole purchase-money of the premises was acknowledged to have been well and truly paid, the party is precluded from saying, in an action at law, that any part of that money remains due; and parol evidence that it was never paid, being inconsistent with the deed, is not admissible. (*Baker v. Dewey*, 1 B. & C. 704; see *Lampon v. Corke*, 5 B. & Ald. 606.)

The lien subsists, notwithstanding the consideration is expressed in the deed to be paid, and a receipt is indorsed upon it, (15 Ves. 337; *Coppin v. Coppin*, 2 P. Wms. 295,) and in such a case a court of equity will grant relief as well as discovery. (*Ryle v. Haggie*, 1 Jac. & Walk. 234.)

An unpaid vendor is entitled to proceed as a mortgagee, and to have the estate resold, and the produce applied, first, to pay the expenses of resale, and, secondly, the purchase-money. (*Hope v. Booth*, 1 B. & Ad. 498.)

In an early case it was decided that the statute of limitations could not be pleaded in bar to a suit for a legacy, although it had been due twenty years. (*Anon. Freem. C. C. 22*; see also 1 Vern. 256.) But though the statute could not be pleaded, yet in many cases it was adopted where there was no fraud, and the parties had permitted the assets to be distributed without claiming the legacy for thirty-five or forty years, and was a good defence by way of answer upon the ground of raising a presumption of payment. (*Higgins v. Crawford*, 2 Ves. jun. 572; *Pickering v. Stamford*, Id. 682; S. C. 4 Br. C. C. 214; *Jones v. Turberville*, Id. 115; S. C. 2 Ves. jun. 11.) And it seems that the lapse of twenty years after the testator's death without any demand of the legacy would have been sufficient to afford a presumption of payment. (*Montezor v. Williams*, 1 Rop. on Leg. 792, 2d ed.) In the recent case of *Campbell v. Graham*, (1 Russ. & Mylne, 453,) in which this doctrine was much considered, a party bought a legacy, which was assigned to him twenty-seven years after the testator's death, and four years more elapsed before the filing of the bill; and it was held that he was barred by length of time, and on an appeal to the House of Lords such decision was affirmed. (2 Cl. & Finn. 429.) Under particular circumstances, thirty-nine years was held not sufficient to raise the presumption of the payment of legacies. (*Shields v. Rice*, 3 Jurist, 950.) But it has been held that a legatee might recover a legacy, though ten years had elapsed without any demand. (*Lee v. Brown*, 4 Ves. 362.) From mere lapse of time the only presumption that can be drawn is this, that which ought to have been done at the commencement of the period has been done at the end. Presumption of payment of a legacy from mere length of time cannot be inferred where such payment is out of the ordinary course of transactions. A payment is *presenti* of a sum due *in futuro* cannot be presumed without evidence of it. (*Price v. Horniblow*, 2 Y. & Coll. 206.)

ARREARS OF DOWER.

Time of Limitation fixed, Six Years.

XLI. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any

No arrears of dower to be recovered for more than six years.

action or suit for a longer period than six years next before the commencement of such action or suit. (*k*)

(*k*) In equity, as at law, there was before this act no limitation to a claim of the *arrears* of dower. (*Oliver v. Richardson*, 9 Ves. 222.) And though at *law*, by the death of the heir, the widow lost all arrears incurred in his lifetime, (*Mordaunt v. Thorold*, 3 Lev. 375,) yet, in equity, if she had filed her bill before the death of the heir, she was entitled to the *mesne* profits (*Curtis v. Curtis*, 2 Br. C. C. 620,) from the time her title accrued, (*Dormer v. Fortescue*, 3 Atk. 130,) provided that she had made an entry; (*Tilley v. Bridger*, 2 Vern. 519; S. C. Prec. in Ch. 252;) and so in case of her death were her representatives. (*Wakefield v. Child*, 1 Fonbl. Eq. 159, n.; see 3 & 4 W. 4, c. 105, for amending the law of dower, *post*.)



ARREARS OF RENT OR INTEREST.

Time of Limitation fixed, Six Years.

No arrears of rent or interest to be recovered for more than six years.

XLII. And be it further enacted, that after the thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgage or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time

that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years. (I)

(I) The statute 3 & 4 Wm. 4, c. 27, s. 42, is prospective in This section is operation, and not retrospective, and therefore does not not retro- effect parties to any suits which were commenced before its spective. provisions took effect. (*Paddon v. Bertlett*, 3 Ad. & Ell. 884; 6 Nev. & M. 383; *Peyton v. M'Dermot*, 1 Drury & W. 198. In *Vincent v. Wellington*, 1 Longfield & T., the statute was held to be retrospective.) The 2nd section of the act provides for the case where the right or title to an annuity is disputed. (See Cases not within the 42nd section. *ans*, p. 120.) The 42nd section provides for the case where the title to the annuity is not disputed, but the distress is made for the arrears due. (*James v. Salter*, 3 Bing. N. C. 552.) Arrears of rent, or of an annuity secured by deed, may be recovered for twenty years under the statute 3 & 4 Wm. 4, c. 42, s. 3, notwithstanding the 42nd section of 3 & 4 W. 4, c. 27. (*Paget v. Foley*, 2 Bing. N. R. 679; *Strachan v. Thomas*, 4 P. & Dav. 229; 4 Jur. 1183; see post, pp. 264, 265.) It was decided in Ireland that a judgment is not a sum of money charged upon or payable out of land within the meaning of the 42nd section of 3 & 4 Will. 4, c. 27. (*Kealey v. Bodkin*, 1 Saunde & Sc. 211.) But some of the reasons given in that case cease to be applicable since the stat. 3 & 4 Vict. c. 105, s. 28. (See post, p. 260, and *O'Kelly v. Bodkin*, 2 Ir. Eq. R. 361, 368.) By stat. 21 Jac. 1, c. 16, s. 3, actions of debt for arrears of rent must have been commenced and sued within six years after the cause of such actions. This statute was confined to actions for arrears of rent upon a demise without deed, and did not extend to cases of rent reserved by specialty. (*Freeman v. Stacey*, Hutton, 109.) The stat. 21 Jac. 1, Tithes. c. 16, s. 3, could not be pleaded in an action of debt under the 2 & 3 Edw. 6, c. 13, for not setting out tithes. (*Talory v. Jackson*, Cro. Car. 513; see 1 Mod. 246.) But by statute 53 Geo. 3, c. 127, s. 5, "No action shall be brought for the recovery of any penalty for the not setting out tithes, nor any suit instituted in any court of equity, or in any Ecclesiastical Court, to recover the value of any tithes, unless such action shall be brought, or such suit commenced, within six years from the time when such tithes became due." In bills for an account of tithes, courts of law and equity have a concurrent jurisdiction; and inasmuch as in a court of law arrears of tithes can be recovered only for six years before the commencement of the action; so in a court of equity the account will be carried back only six years previous to the filing of the bill. (*Collins v. Archer*, 1 Russ. & Mylne, 284; see *Chichester v. Sheldon*, Turn. & Russ. 253; S. C. 3 E. & Y. 1102; *Garnard v. Schollar*, 3 Gwill. 1045; S. C. 2 E. & Y. 282.) Not

Tolls.

more than two years arrears of any tithe commutation rent charge is recoverable by distress or entry under stat. 6 & 7 Will. 4, c. 71, ss. 81, 82.) The trustees of a turnpike road, pursuant to a power given to them by act of parliament, mortgaged to J. M. such share and proportion of all the tolls as the money advanced by him should bear to the whole principal amount advanced on the tolls. The security was continued by various acts of parliament, but no interest was paid in respect of such mortgage for thirty-years and upwards. It was held, in a suit instituted by the representative of J. M., against one of the trustees of the road, seeking payment of all the arrears of interest due to him out of all the tolls, that he was not barred by the statute of limitations from recovering the whole of such arrears (tolls not being within the meaning of the act), but that the other mortgagees on the tolls were necessary parties to a suit for that purpose. (*Mellish v. Brooks*, 3 Beav. 22; 4 Jur. 739; *ante*, p. 105.)

When arrears
of interest are
limited to six
years.

A canal company conveyed, under their common seal, the canal works and rates to a mortgagee, to hold until the sum borrowed, with interest, should be repaid. There was no covenant to repay. It was held that, under the statutes 3 & 4 Will. 4, c. 27, s. 42, that, although the mortgagee could recover the principal within twenty years, yet his remedy for arrears of interest was limited to six years. There being no covenant or engagement to pay, but simply a conveyance of the canal, there was not the species of action of covenant, or of debt upon bond, or other specialty, referred to in the stat. 3 & 4 Will. 4, c. 42, s. 3, *post* 263. (*Hodges v. Croydon Canal Company*, 3 Beav. 86.)

No more than six years' arrears of interest of money charged on lands can be recovered, though the deed creating the charge vested the lands in trustees to secure it, and though the defendant held possession with knowledge of the trust. (*Byrne v. Robinson*, 1 Haig, H. & S. Ir. Eq. R. 333.) By a marriage settlement of the year 1798, certain lands were limited to trustees to the use of A. the husband, and B. the intended wife, and the survivor of them, for their respective lives, with remainder to the issue of the marriage, and also to C. (a daughter of B. by a former marriage) in such shares as the survivor of them, the said A. and B., should appoint. In 1819, A. being the survivor, in pursuance of the power, appointed a certain sum to C., and limited a portion of the said lands to trustees, to receive and levy by sale or mortgage the sum so appointed, and directed that the same should bear interest, and be payable on the marriage of C., with a proviso, that if the marriage of C. should take place in the lifetime of A., the said principal sum should not be raised until twelve months after the decease of A. On a bill filed by C. and her husband after the death of A., against a son of A. and B., who had got into, and continued in, the possession of the lands since the year 1820, and disputed the validity of the original settlement of 1798, it

was held that the plaintiffs were within the 42nd section of 3 & 4 Will. 4, c. 27, and therefore only entitled to six years' arrears of interest on their charge. (*Burns v. Robinson*, 1 Drury & W. 688.) In this case the Lord Chancellor only intended to decide that the case was not within the 25th section. (*Dillon v. Cruise*, 3 Deasy, S. J. & M. Irish Law & Eq. R. 82.)

To an action of covenant upon an indenture of demise for rent, the defendant pleaded the 3 & 4 Will. 4, c. 27, s. 42, and it was held by the Court of Exchequer in Ireland (contrary to the case of *Paget v. Foley*, 2 Bing. N. C. 679) that the statute did apply to such a case. (*Bruen v. Nolan*, 1 Jebb & Symes, 346, n.; see *Armstrong v. Lloyd*, 2 Brady, A. & M. 70.) In replevin the plaintiff declared for a taking on the 9th August, 1838, and the defendant avowed for five years of arrears of rent next before and ending on the 25th March, 1836, due to the defendant by virtue of a demise theretofore made; to this avowry the plaintiff pleaded, amongst other pleas, a plea of the statute 3 & 4 Will. 4, c. 27, s. 42, to the whole amount of the arrears. The defendant demurred, principally on the ground that the plea of the statute should have been confined to the period of the five years, which were outside six years, but the court overruled the demurrer. (*Wilson v. Jackson*, 2 Brady, Adair & Moore, 1.) A party on whose estate the plaintiff had a charge for principal and interest, being desirous of paying it, instead of having it raised out of the estate, was ordered to pay it into court by a given day. He made default, and applied for an extension of the time, which was granted. It was held, that the plaintiff was not entitled to subsequent interest on the aggregate of principal and interest due, but on the principal only. (*Wilkinson v. Charlesworth*, 2 Beav. 470.) In a foreclosure suit, the defendants, some of whom were minors, by their answer relied on the statute of limitations as disentitling the plaintiff to more than six years' interest. In the progress of the cause, an order was made upon consent, in pursuance of which a payment was made to the plaintiff on account of his demand. It was held that, although such payment would have defeated the bar of the statute set up by the answer, had the transaction taken place between adults, yet as the interests of minors were concerned, the payment ought to be considered as made without prejudice to the rights, and subject to the equities of the parties in the cause, and ought not, therefore, to be permitted to defeat the defence relied upon by the answer. It is questionable how far the officer is authorized to decide between the parties in a cause upon a pleading by way of discharge, filed in the office, relying on the statute of limitations. (*Thorntons v. M'Donough*, 2 Ir. Eq. R. 97.)

Part payment.

A. being entitled to a mortgage on certain lands vested in a trustee for him, agrees that a subsequent annuity creditor should have precedence over his debt, and joins in a demise of the lands to a trustee for the annuitant, but his trustee who had the legal estate did not join in the demise. A. remains in possession.

Case within exception in 42nd section.

No saving in
favour of per-
sons under
disabilities.

sion until the death of the grantor of the annuity. It was held that the annuitant was not debarred from recovering more than six years' arrears, as the annuitant fell strictly within the literal terms of the exception in the 42nd section of 3 & 4 Will. 4, c. 27. (*Drought v. Jones*, 2 Ir. Eq. R. 303.) It will be observed that the 42nd section contains no exception in favour of persons under disabilities; and if the act be construed literally, infants and lunatics, and other persons under disabilities, will only be enabled to recover six years' interest. It has been observed by a learned writer, "that even as to legacies charged upon real estates, there is no saving as to arrears of interest for infancy, or the like. In the case of younger children's portions, although by way of legacy, the interest is often allowed to remain in arrear for several years, for the accommodation of the head of the family; and the statute will, unless it be modified, often bar a just claim unnecessarily, and ultimately injure the person whom it was intended to benefit; and whether a legacy be payable out of real or personal estate, of course interest upon it, where it carries interest, ought not to be barred during the infancy of the legatee." (2 Sugd. V. & P. 364, 365, 10th ed.)

Jury may
allow interest
on debts.

By statute 3 & 4 Will. 4, c. 42, s. 28, (3 & 4 Vict. c. 105, s. 53, Ireland,) it is enacted, that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demandant shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that the interest shall be payable in all cases in which it is now payable by law. (See *Higgins v. Sargent*, 2 B. & C. 348; *Ram on Assets*, p. 560—576.) This act contains a further proviso that such interest so to be allowed by such jury shall not be so allowed for any period exceeding six years.

Where jury
may give
damages as
interest.

The jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest (in Ireland for any period not exceeding six years) over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions of policies of assurance made after the passing of this act (14th August, 1833, England; 10th August, 1840, Ireland); 3 & 4 Will. 4, c. 42, s. 29; (3 & 4 Vict. c. 105, s. 54, Ireland.) If any person shall sue out any writ of error upon any judgment whatsoever given in any court in any action personal, and the court of error shall give judgment for the defendant thereon, then interest shall be allowed by the court of error for such time as execution has been delayed

Interest to be
allowed on
writs of er-
ror for delay
in execution.

by such writ of error, for the delaying thereof. 3 & 4 Will. 4, c. 42, s. 30; (3 & 4 Vict. c. 105, s. 66, Ireland.)

On a judgment affirmed on a writ of error, the House of Lords gives interest from the day of its affirmance, pursuant to the provisions of the statute 3 & 4 Will. 4, c. 42, s. 30. (*Garland v. Cartledge*, 5 Clark & Finn. 364.) Where judgment is given in a court of error for the defendant, the court is bound under 3 & 4 Will. 4, c. 42, s. 30, to allow interest, which, it seems, will be 4l. per cent. for the time that execution has been delayed by the court of error. (*Levy v. Landridge*, 4 Mees. & W. 337. See *Burn v. Carvalho*, 4 Nev. & M. 893; 1 Ad. & Ell. 895, where no interest was allowed, because the writ of error was tested before the statute received the royal assent.) By a contract of sale, the purchaser was to pay a certain sum by six instalments, and also 6l. per cent. half-yearly from the day appointed for the payment of the second instalment, upon the four remaining instalments, until paid; such additional sums, by way of per centage, to be secured by the bond of the purchaser. In the contract, and also in the declaration thereon, this additional per centage was called interest upon the instalments; neither the instalments nor the additional per centage were paid as they became due, nor was any bond given: it was held, that the purchaser was chargeable with interest upon the last four instalments, until actual payment of those instalments; but that the jury were not bound either at common law, or under 3 & 4 Will. 4, c. 42, s. 28, to give interest upon the additional per centage treated by parties as interest. (*Atwood v. Taylor*, 1 Mann. & G. 279; 1 Scott, N. R. 611.) In an action on an attorney's bill, the plaintiffs gave notice, pursuant to 3 & 4 Will. 4, c. 41, s. 28, that they should claim interest from the date of the notice. After the writ was issued, the bill was referred for taxation at the instance of the defendant, no terms being made as to allowance of interest: it was held, that the plaintiffs could not afterwards have an assessment of damages for the purpose of recovering the interest. (*Berrington v. Phillips*, 1 Mees. & Wels. 48.)

Before the passing of the act 3 & 4 Will. 4, c. 42, at law a judgment did not carry interest, but interest might be recovered at law, in the shape of damages, by an action on the judgment. (*Gaunt v. Taylor*, 3 M. & Keen, 302. As to the practice of courts of equity in giving interest on judgments, see 1 C. P. Cooper's R. 230—250, n. As to payment of interest generally, see Harr. Index, tit. Interest; 2 Stark. on Ev. 575—579, 3rd ed.) The stat. 3 & 4 Will. 4, c. 42, being a remedial act, a court of equity will adopt many of its provisions, changing its formal language, and adapting it to the practice of the court. If after the passing of that act an action could have been brought on a judgment, the jury will be directed by the judge to exercise their discretion upon the point of interest; so it will be allowed in equity, if a step is taken equivalent to an

Cases on construction of act 3 & 4 Will. 4, c. 42, ss. 28—30.

action. In 1795, an annuity was granted for the grantor's life, and was secured by a bond and by a warrant of attorney, on which judgment was entered up. The grantor died intestate in 1810, at which time the annuity was greatly in arrear. The grantor's assets consisted solely of a fund in court, which had been accumulating from the grantor's death. No administration was taken out to the grantor until 1834. It was held, that the grantee was entitled to be paid the arrears of the annuity, with interest at five per cent. from the death of the grantor. (*Hyde v. Price*, 8 Sim. 578.)

Judgment
debts to carry
interest.

Every judgment debt shall carry interest at the rate of 4l. per centum per annum from the time of entering up the judgment or from the 1st October, 1838, in cases of judgments then entered up, and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment. Decrees and orders of courts of equity, and in bankruptcy and lunacy, and rules of the superior courts of common law, ordering the payment of money, &c. to any person, are to have the same effect as judgments in the courts of common law. 1 & 2 Vict. c. 110, s. 18; (3 & 4 Vict. c. 105, s. 27, Ireland.) Every judgment debt due upon any judgment not confessed or recovered for any penal sum for securing principal and interest, shall carry interest at the rate of 4l. per cent. per annum from the time of entering up the judgment, or from the 1st November, 1840, in cases of judgments then entered up, and not carrying interest until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment. 1 & 2 Vict. c. 110, s. 17; (3 & 4 Vict. c. 105, s. 26, Ireland.)

Interest not
allowed be-
yond penalty
of bond.

It is the general rule both at law (*Brangwin v. Parrot*, 2 W. Bl. 1190; *White v. Sealy*, 1 Dougl. 49) and in equity (*Bromley v. Goodere*, 1 Atk. 75) to consider the penalty of the bond as the limit of the debt or damages which can be recovered. But there are exceptions to this rule. (See the cases collected in 1 C. P. Cooper's R. 209—230.) A person conveyed estates to trustees upon trust to sell and apply the produce of sale in discharging all his bond debts, together with the interest then due and to grow due for the same to the day of payment. A bond creditor, claiming under this deed, is not entitled to principal and interest beyond the amount of the penalty of the bond. (See *Clarke v. Lord Abingdon*, 17 Ves. 106; *Hughes v. Wynn*, 1 Mylne & Keen, 20.)

Where in a creditors' suit bond creditors had been allowed by the master, their principal and interest, to the extent of the penalties of the bonds, and had received an apportionment upon the sums so amounting to the penalties; upon further funds becoming available for the creditors, it was held, that the bond creditors were entitled to subsequent interest on the sums remaining due on the conditions of the bonds, provided that such interest, together with the sums remaining due, did

not exceed the penalties in the bonds. (*Walters v. Meredith*, 2 You. & Coll. 264.)

In cases where a party has slept on his rights, and no compromise or discussion of his claims has taken place, and where the defendant is ignorant thereof, and there is no disability on the one side nor fraud on the other, interest on a portion, or an amount of rents, will not be carried farther back than the filing of the bill. (1 Ball & B. 180.) Lord Hardwicke, in *Dormer v. Fortescue* (3 Atk. 130), mentioned several cases in which the Court of Chancery directs an account of rents and profits from the time the title accrued, as where there is a trust, and a mere equitable title, or upon a bill brought by an infant, as every person who enters upon the estate of an infant enters as guardian or bailiff to him. (*Newburgh v. Bickerstaffe*, 1 Vern. 295; *Hutton v. Simpson*, 2 Vern. 724; *Tilley v. Briggs*, Prec. Chan. 252; *Duke of Bolton v. Deane*, Id. 516; *Denne v. Whitehead*, 2 P. Wms. 644.) So upon a legal title, where the plaintiff has been kept out by the fraud, misrepresentation, or concealment of his title by the defendant. (*Denne v. Whitehead*, sup.; *Duke of Bolton v. Deane*, sup.; *Tennesson v. Ash*, 3 Atk. 340.) In *Money Penny v. Bristol* (2 Vern. & M. 770), the account was taken from the time the plaintiff's title accrued, because the defence of the statute of limitations was not raised by the pleadings. So in *Pultney v. Warren* (6 Ves. 73), Lord Eldon decreed an account of the profits from the time of the title accruing, against executors, upon the special ground that the plaintiff was prevented recovering in ejectment by the rule of a court of law, and by an injunction at the instance of the occupier, who ultimately failed both at law and in equity. But in these cases the account cannot go beyond six years by analogy to the action for the profits. (*Reade v. Reade*, 5 Ves. 744; *Harmood v. Oplander*, 6 Ves. 215.) So where an estate was held under trustees and the tenants insisted on the statute of limitations, the account of rent was only ordered for six years before the filing of the bill. (*Hercy v. Ballard*, 4 Br. C. C. 468.) But where there has been a mere adverse possession without fraud, concealment, or an adverse possession of some instrument, without which the plaintiff cannot proceed, or where there has been any considerable degree of laches on the part of the plaintiff, the account shall only be taken from the filing of the bill. (Id.; *Dormer v. Fortescue*, sup.; *Forder v. Wade*, 4 Br. C. C. 520; *Drummond v. Duke of St. Alban's*, 5 Ves. 433; *Pettitward v. Prescott*, 7 Ves. 541; *Pickett v. Logan*, 16 Ves. 215.) The right to an account, even in the case of mines, may be lost by laches. (*Parrott v. Palmer*, 3 Myl. & K. 632.) A party's right to an account may also be restricted in consequence of laches in not finding out a mistake earlier by the means which were in his power. (*Denys v. Stuckburgh*, 4 Y. & Coll. 42.)

Account of
rents in
equity.

There is no fixed limit of time in directing an account in cases of charities.

against the trustee of a charity. But where there has been a long period, during which a party has, under an innocent mistake, misapplied a fund, from the laches and neglect of others in not setting him right, and when the accounts have in consequence become entangled, the court, under its general discretion, considering the enormous expense of the inquiries, the great hardship of calling upon representatives to refund what families have spent, acting on the notion of its being their property, in giving relief, has fixed a period to the account. The accident of when the information was filed, or the demand was made, can only be material as putting the parties on their guard, and therefore leaving them without excuse for any errors they may commit. The result of the authorities is, that in each case the court is bound by the particular circumstances. (*Attorney General v. The Mayor of Exeter*, Jac. 448.) An account against a corporation for a breach of trust in receiving charity funds was not confined either to the filing of the information nor to six years before that time. (*Attorney General v. Brewers' Company*, 1 Mer. 495; *Attorney General v. Corporation of Stafford*, 1 Russ. 547.) And an account of the rents and profits of a charity estate was decreed for a period of 200 years against the corporation, who, by their answer, admitted the receipt, and stated that they had from time to time debited themselves in their books with the amount. (*Attorney General v. Mayor of Exeter*, Jac. Rep. 443; S. C. 2 Russ. 362.) When the Court of Chancery limits an account of the rents and profits of charity estates to the time of filing the information, or to six years before that date, it does not act with reference to the statute of limitations. The court proceeds upon the principle that it will not deal harshly with men, who, meaning to discharge their duty faithfully, have nevertheless mistaken it. (*Attorney General v. Mayor of Exeter*, 2 Russ. 367.) If there be a fair and honest intention on the part of those who have the management of a charity, it is not the practice of the court, though that rule should be founded in mistake, to hold trustees responsible for acts so done, or to call back money which they have so paid. (*Attorney General v. The Dean and Canons of Christchurch*, 2 Russ. 324.) The principles upon which the court acts in taking an account against corporations who are trustees of charities, and have misapplied the funds, are discussed in *Attorney General v. Mayor, &c. of Newbury*, 3 Myl. & Keen, 647. (See Shelford on Mortmain and Charities, pp. 455—467.) Length of time would not protect a purchaser with notice of charitable trusts. (*Attorney General v. Christ's Hospital*, 3 Myl. & Keen, 344; see *Attorney General v. Mayor of Bristol*, 2 Jac. & W. 321; *Attorney General v. Poulden*, 8 Sim. 472, *ante*, p. 106.)

Writ of error. By stat. 10 & 11 Will. 3, c. 14, no fine, common recovery, nor any judgment in any real or personal action, shall be reversed or avoided for any error or defect therein, unless the writ of error or suit for the reversing such fine, recovery, or

judgment, be commenced, or brought and prosecuted with effect, within twenty years after such fine levied, or such recovery suffered, or judgment signed or entered of record. The act contains a proviso in favour of persons under disabilities bringing writs of error within five years after their removal. It was decided that the writ could not be brought after twenty years, although the title of the party prosecuting it at law did not previously accrue. (*Lloyd v. Vaughan*, 2 Str. 1257.) The Irish stat. 4 Geo. 1, c. 10, contains similar provisions for reversing fines and recoveries, and the 6 Geo. 1, c. 6, the same with respect to judgments in real or personal actions.

Bills of review have been generally disallowed after twenty years have elapsed from the time of pronouncing a decree which has been signed and inrolled, by analogy to the statute 10 & 11 Will. 3, c. 14. (4 Burr. 1963; 1 Br. P. C. 95; 5 Br. P. C. 460; 6 Br. P. C. 396.) But persons under any of the disabilities specified in that statute are allowed the further period of five years after their removal. (*Lytton v. Lytton*, 4 Br. P. C. 458.) No petition of appeal from any decree signed and inrolled, or extracted, will be received by the House of Lords after five years from the signing and inrolling or extracting of such decree, and the end of fourteen days, to be accounted from the first day of the sessions next ensuing the said five years; unless such person entitled to such appeal be within the age of twenty-one years, or covert, non compos mentis, imprisoned, or out of Great Britain, in which case such person may bring his appeal within five years next after full age, discovery, coming of sound mind, enlargement out of prison, or coming into Great Britain, &c.: and fourteen days to be accounted from the first day of the sessions next ensuing the said five years. (Lords' Journ. 24th March, 1725.)

Appeal to House of Lords.

A decree establishing a charge was carried into execution, though not proceeded on for forty years, where there was an acknowledgment within twenty years of the subsistence of the charge. (*Barrington v. O'Brien*, 1 Ball & B. 173; 2 Id. 144; see 19 Ves. 587.) A decree to carry into execution an erroneous decree being reversed, the cause was remitted, with leave to amend the bill, by adding parties and making a better case as to the original claim, notwithstanding the lapse of sixty years from the date of the deed by which the debt was secured, and of forty years from the date of the erroneous decree, as between the plaintiff creditor and the debtor there is no presumption from lapse of time, in such a case and upon such state of the pleadings, that the debt has been paid; but other creditors, whose debts ought to have been provided for by the decree, might have a right to raise that question. (*Hamilton v. Broughton*, 2 Bligh, 169.)

The third section of the 3 & 4 Will. 4, c. 42 (3 & 4 Vict. c. 105, s. 32, Ireland), enacts, "that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of

Limitation of action of debt on specialties, &c.

debt or scire facias upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon any indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after: provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

Twenty years' arrears of rent and annuity secured by deed may be recovered.

An action of covenant for rent in arrear may be brought within the time limited by 3 & 4 Will. 4, c. 42, s. 3, and is not limited to six years by the 42nd section of 3 & 4 Will. 4, c. 27. *Tindal, C. J.*, after observing that the stat. 3 & 4 Will. 4, c. 27, was not proposed to include rents reserved on leases, (see *ante*, pp. 122—127,) proceeded, "however, it is not necessary to give an opinion on the point; for, on comparing the 42nd section of 3 & 4 Will. 4, c. 27, with the 3rd section of 3 & 4 Will. 4, c. 42, it if was intended in the former to exclude rent on an indenture of lease, the latter statute has now excluded that species of rent from the operation of the former. The first act received the royal assent on the 24th July, 1833, and was to come in force on the 1st January, 1834, the second received the royal assent on the fourteenth August, 1833, and was to come in force on the 1st June, 1833. The legislature, therefore, by the second statute made a new and distinct enactment to come into operation before the other. If there be any thing in the second irreconcilable with the first, it would be a strange proceeding that the legislature should designedly pass one law to be in force for some time in one year, and a different law on the same subject matter to come in force the next. But it seems to me that there is nothing conflicting in the two. The words of the third section of 3 & 4 Will. 4, c. 42, are not merely negative words but import an affirmative also, not merely that a plaintiff may not sue for rent accruing more than ten years before, but that he may sue for all that time to come for rent in arrear at the time the act passed. Therefore here is in August, 1833, a legislative declaration that actions may be brought for rent in all that period; compare that with section

42, in 3 & 4 Will. 4, c. 27, if that section is to be taken as comprehending similar causes of action. If the forty-second section of 3 & 4 Will. 4, c. 27, is a general enactment, the subsequent declaration that an action of covenant may be commenced during a longer period is virtually an exception out of the former; we are to reconcile the two enactments if it be possible, but if it be not, the affirmative and negative cannot co-exist, and the action of covenant must be taken as an exception; therefore, without affecting the clause in the first statute further than is necessary to give effect to the second, we decide that the plea of six years' limitation of the cause of action is bad." (*Paget v. Foley*, 2 Bing. N. R. 679; 3 Scott, 135; see *Paddon v. Bartlett*, 3 Ad. & Ell. 895; 5 Nev. & M. 383; *Wilson v. Jackson*, 2 Brady, Adair & Moore, 1; *ntz*, p. 257.)

An action of debt upon a covenant in an indenture granting an annuity or rent-charge to issue out of land, may be brought within the period of twenty years limited by 3 & 4 Will. 4, c. 42, s. 3, and is not barred by 3 & 4 Will. 4, c. 27, s. 42, which limits the recovery of arrears of rent within six years. (*Strachan v. Thomas*, 4 P. & Dav. 229; 4 Jurist, 1183.)

It has been already stated that a court of equity will adopt many of the provisions of the stat. 3 & 4 Will. 4, c. 42. (*Hyde v. Price*, 8 Sm. 578; see *ante*, pp. 259, 260.)

The 4th section of 3 & 4 Will. 4, c. 42, (3 & 4 Vict. c. 105, s. 33, Ireland,) enacts, "that if any person or persons that is or are or shall be entitled to any such action or suit, or to such *acire facias*, (*ante*, pp. 263, 264,) is or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discover, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that if any person or persons against whom there shall be any such cause of action, is or are or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas."

Bremedy for infants, femes covert, &c.

Absence of defendants beyond seas provided for.

The 5th section of 3 & 4 Will. 4, c. 42, (3 & 4 Vict. c. 105, s. 34, Ireland,) provides, "that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after

Proviso in case of acknowledgment in writing, or by part payment.

such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action, or any indenture, specialty or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute." (See the cases as to acknowledgments, *ante*, pp. 232—246.)

• *Lays on*

The limitation after judgment or outlawry reversed.

The 6th section of 3 & 4 Will. 4, c. 42, (3 & 4 Vict. c. 105, s. 35, Ireland,) enacts, "if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, then in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

No part of the United Kingdom, &c. to be deemed beyond the seas within the meaning of this act.

The 7th section of 3 & 4 Will. 4, c. 42, enacts, "that no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the act passed in the 21st year of the reign of King James the First, intituled, 'An Act for Limitations of Actions, and for avoiding of Suits in Law.'" (See *ante*, s. 19, p. 181.)

Notwithstanding the act of Union, and the 3 & 4 Will. 4, c. 42, s. 7, Ireland is still a place beyond the seas within the stat. 4 Ann. c. 16, s. 19, which provides that if a defendant in certain actions, at the time the cause of action accrued, shall be beyond the seas, the person entitled to such action shall be at liberty to bring his action against such person after his return from beyond the seas, within the time specified in that act and in the stat. 21 Jac. 1, c. 16. (*Lane v. Bennett*, 1 Mee. & W. 70. See *Battersby v. Kirk*, 2 Bing. N. C. 603.)

Beyond seas.

No part of the United Kingdom, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of her majesty, to be deemed to be beyond the seas within the meaning of the act 3 & 4 Vict. c. 105, or of the Irish Statute of Limitations, 10 Car. 1, sess. 2, c. 6. (3 & 4 Vict. c. 105, s. 36.)

Presumption of payment of bonds.

Satisfaction of money secured on bonds has been long presumed after twenty years. (3 P. Wms. 396; 2 Atk. 144.) But such presumption of payment might, like every other mere

presumption, have been encountered by evidence to repel it, as if the interest were proved to have been paid within the time conceived to furnish the presumption, (8 Mod. 278; 2 Ld. Raym. 1370; 3 Br. P. C. 535; 2 Str. 827; 2 Cox, 118;) or if the obligor had had no opportunity nor means of paying, (*Fladong v. Winter*, 19 Ves. 196;) or had been abroad ever since he acknowledged by letter the debt to be due. (*Newman v. Newman*, 1 Stark. N. P. C. 101.) The simple payment of interest which has accrued within twenty years, is a clear acknowledgment that the bond was unsatisfied. Payment within twenty years of interest, which has accrued beyond the twenty years, is only proof that such a bond once existed. But a receipt indorsed on the bond signed by the obligee, but prepared by a third party, who paid such interest, was held an admission that the debt was subsisting within twenty years. (*Sanders v. Merdick*, 3 Mann. & Ryl. 116.) And even the production of a receipt for interest within twenty years, indorsed on a bond by the obligee, though the time when such receipt was written and signed did not appear otherwise than by the indorsement itself, has been held to rebut the presumption of payment. (*Barrington v. Searle*, 3 Br. P. C. 535; *Glyn v. Bank of England*, 1 Ves. sen. 43.) Where, in debt on a bond more than twenty years old, to rebut the presumption of payment, the obligee gave evidence of payment of interest by the obligor to A. B. equal in amount to the interest that would have become due on the bond; it was held, that an indorsement on the bond in the handwriting of the obligee, and which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligee in trust for A. B., was admissible in evidence after the death of the obligee to connect the payments of interest with the bond. (*Glendow v. Atkin*, 1 Cr. & Mees. 410; 3 Tyrw. 289. See *Midleton v. Melton*, 10 B. & Cr. 317; 1 Phill. on Ev. 255, 7 ed.) By stat. 9 Geo. 4, c. 14, s. 3, it was enacted, that no indorsement or memorandum of any payment written or made after the 1st January, 1829, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment should be made, should be deemed sufficient proof so as to take the case out of the operation of either of the statutes, 21 Jac. 1, c. 16, or the Irish act, 10 Car. 1, sen. 2, c. 6. Generally speaking, no time short of twenty years could of itself raise a presumption that a bond had been paid; and even where no demand had been made during that time, that was only a circumstance for the jury to found a presumption upon, and was in itself no legal bar. (*Oswald v. Legh*, 1 Term R. 271.) In cases where satisfaction of a bond has been presumed within a less period than twenty years, some other evidence has been given in favour of such a presumption; such as having settled an account in the intermediate time, without any notice having been taken of such a demand.

FINES AND RECOVERIES.

3 & 4 WILLIAM IV. c. 74.

*An Act for the Abolition of Fines and Recoveries, (a)
and for the Substitution of more simple Modes of
Assurance.**

[28th August, 1833.]

DEFINITIONS.

Meaning of
certain words
and expres-
sions.
"Lands."

"Estate."

Be it enacted, by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that in the construction of this act the word "lands" shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents, and hereditaments of any tenure (except copy of court roll), and whether corporeal or incorporeal, and any undivided share thereof, but when accompanied by some expression including or denoting the tenure by copy of court roll, shall extend to manors, messuages, lands, tenements, and hereditaments of that tenure, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity,† and shall also extend

* This act does not extend to Ireland, but on the 15th August, 1834, the statute 4 & 5 Will. 4, c. 92, was passed, entitled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance in Ireland." This act corresponds in most particulars with the English statute. The general period fixed for the Irish act to come into operation is the 31st October, 1834, instead of 31st December, 1833.

† In the glossary clause of the Irish act, the word "estate" is made to extend to "any interest, charge, right, title, lien, or incumbrance in, upon, or affecting lands, either at law or in equity, whether present or vested, or future or contingent."

enters, the plaintiff was entitled to recover it in an action at law. (*Gregory v. Harman*, 1 M. & P. 209; 3 C. & P. 205; *The Corporation of Clergymen's Sons v. Swainson*, 1 Ves. sen. 75; *Rees v. Kennegal*, id. 123; *Rogers v. Soutten*, 2 Keen, 598; *Bothe v. Crampton*, Cro. Jac. 612; *Davis v. Rayner*, 2 Lev. 3; *Goring v. Goring*, Yelv. 10; *Rann v. Hughes*, 7 T. R. 350, n.; *Childs v. Monins*, 2 Brod. & Bing. 460; 5 B. Moore, 282; *Bradley v. Heath*, 3 Sim. 543; *Holland v. Clark*, 1 Y. & Coll. N. C. 151. See Wms. on Executors, 1513—1518, 3d ed.) In an action against executors upon an account stated for a legacy, it is competent to the plaintiff to impeach any particular item or items on the credit side of the account. (*Hess v. Savory*, 2 Scott, 199; 1 Hodges, 269; *Gorton v. Dyson*, 1 Brod. & B. 219; *Moert v. Moessard*, 1 M. & P. 8; *Wemyss v. Earnshaw*, 4 Tyrw. 806; *Roper v. Holland*, 3 Ad. & Ell. 99; 4 Nev. & M. 868.) A testator devised lands in fee, after the determination of certain life estates, to A., B., and C., as tenants in common, subject to and charged with the payment of 200*l.*, which he thereby bequeathed to and to be equally divided among the children of his niece. A. and B. during the life of one of the tenants for life, granted their reversion in two undivided third parts of the lands to mortgagees for 500 years: it was held, that an action of debt could not be maintained against the termors for a share of the 200*l.* so bequeathed. (*Braithwaite v. Skinner*, 5 Mee. & W. 313; 3 Jur. 1054.)

SCOTLAND AND IRELAND.

XLIV. Provided always, and be it further enacted, that this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit* to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland. (n)

Act not to extend to Scotland, nor to advowsons in Ireland.
* *Lays* present.

XLV. And be it further enacted, that this act may be amended, altered, or repealed during this present session of parliament.

Act may be amended.

(n) See ante, p. 209, n. (t).

"Person"	trust or power directing or authorizing the purchase; and the word "person" shall extend to a body politic, corporate, or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and every assurance already made or hereafter to be made, whether by deed, will, private act of parliament, or otherwise, by which lands are or shall be entailed, or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out of the power contained in any settlement, shall be considered as part of such settlement, and the estate created by such appointment shall be considered as having been created by such settlement; (d) and where any such settlement is or shall be made by will, the time of the death of the testator shall be considered the time when such settlement was made: Provided always, that those words and expressions occurring in this clause, to which more than one meaning is to be attached, shall not have the different meanings given to them by this clause in those cases in which there is any thing in the subject or context repugnant to such construction.
Number and gender.	
Settlement.	

The principal
objects of this
act.

- (a) The principal objects of this statute are,
 1st. To abolish fines and recoveries, and to make warranties by a tenant in tail no longer effectual for barring entails.
 2d. To enable a tenant in tail to make an effectual alienation by any deed to be inrolled, by which a tenant in fee can convey.
 3d. To make the beneficial owner of an estate for years determinable on life, or of any greater estate prior to an estate tail under a settlement, the protector of the settlement for the purpose of consenting to a disposition by a tenant in tail in remainder.

4th. To repeal the statute 11 Hen. 7, c. 20, restraining the alienation by married women tenants in tail of lands, of the gift of their husbands, except as to settlements made before the passing of the act 3 & 4 Will. 4, c. 74.

5th. To provide new methods by which estates tail and interests expectant thereon may be barred, as well as to freeholds and copyholds.

6th. To repeal the bankrupt act 6 Geo. 4, c. 16, s. 65, so far as relates to estates tail, and to give to the commissioners of bankrupt other powers of disposing of the estates tail of bankrupts.

7th. To repeal the statutes 39 & 40 Geo. 3, c. 56, and 7 Geo. 4, c. 45; and to extend the substitute for fines and recoveries to the case where money is directed to be laid out in the purchase of lands to be settled, so that any person, if the land were purchased, would have an estate tail therein.

8th. To enable married women, with the concurrence of their husbands, to dispose of lands and money subject to be invested in lands, and to release or extinguish any interest or powers as if sole by deeds to be acknowledged by them before Judges, Masters in Chancery, or Commissioners.

By the common law, before the stat. Westm. 2, commonly called the statute *de donis*, (13 Edw. 1, c. 1,) there were two kinds of estates of inheritance: the one a fee simple absolute, where lands were limited to a man and to his heirs generally; and the other a fee simple conditional, where lands were given to a man and to the heirs of his body. (See *Willion v. Berkeley*, Plowd. 227—252; 2 Prest. on Est. 323—354.)

The estate of a tenant in tail grew out of the ancient conveyances to a man, and to the heirs of his body. Under such a conveyance, it was held at common law, that, until issue born, the grantee had not the absolute property in the estate, it being limited by the grant, not to his general heir, but to the heirs of his body; but that the moment issue was born, the condition being performed, the estate became absolutely his property for some purposes, (2 Bl. Comm. 111), and he could dispose of it in the same manner as if he had held it in fee simple. The legislature, however, thought fit to interfere; and by the statute *de donis* it was declared that the will of the donor or grantor should be observed, and that an estate so granted to a man and the heirs of his body should descend to the issue, and that he should not have power to alienate the estate. (3 Madd. 531, 532.)

Two things are essential to an entail within the statute *de donis*. One requisite is, that the subject be land or some other thing of a real nature. The other requisite is, that the estate in it be an inheritance. Therefore neither estates *pur auter vie* in lands, though limited to the grantee and his heirs during the life of *cestui que vie*, nor *terms for years*, are entailable any more than personal chattels; because as the latter, not being either interests in things real or of inheritance, want both

requisites; so the two former, though interests in things real, yet not being also of inheritance, are deficient in one requisite. However estates *pur autre vie*, terms for years, and personal chattels, may be so settled as to answer the purposes of an entailed estate, and be rendered unalienable almost for as long a time as if they were entailable in the strict sense of the word. (Harg. Co. Litt. 20, a, n. (5). See Fearn, 495—501, 7th ed.) Copyholds cannot be entailed, except by custom. (3 Rep. 8; 2 Bl. Comm. 113. See *post*, note to section 50.) And if an annuity be granted out of personal estate to a man and the heirs of his body, it is a fee conditional at common law, and there can be no remainder or further limitation of it; and when the grantee has issue, he has the full power of alienation, and of barring the possibility of its reverting to the grantor by the failure of the issue of the grantee. (2 Ves. sen. 170; 1 Br. C. C. 325.) A quasi estate tail in lands held *pur autre vie* may be barred by deed, surrender, or even by articles; (*Guy v. Mannock*, 2 Eden, 339; see 16 Ves. 313; Coop. C. C. 178; 1 Mer. 655;) but not by will. (*Hopkins v. Ramadge*, Batty, 365; 1 Sch. & Lef. 281; 1 Ball & B. 77; but see 6 T. R. 292, *contra*.) So by the surrender and renewal of a lease for lives by the first quasi tenant in tail of it, even without the concurrence of the trustees, he may acquire the absolute ownership of the lease. (*Blake v. Blake*, 1 Cox, 266; 3 P. Wms. 10, note 1, by Cox. See Coop. R. 184, 185.) But a quasi tenant in tail in remainder of an estate *pur autre vie*, after an estate for life to some other person with remainder over, could not by his own act, by fine or otherwise, in the lifetime of the tenant for life, and without his concurrence, bar the remainders over. (*Slade v. Pattison*, 5 Law Journ. N. S. Chancery, 51, affirmed on appeal to the Lords Commissioners, July, 1835. See *Westneys v. Chappell*, 3 Br. P. C. 50.) So where an estate *pur autre vie* is limited to one for life with remainder over, there the first taker cannot bar the remainder, unless the remainderman in tail joins. (*Low v. Barron*, 3 P. Wms. 262; *Osbrey v. Bury*, 1 Ball & B. 53.) The statute 3 & 4 Will. 4, c. 74, has not altered the law with respect to quasi entails in estates *pur autre vie*, or in mere chattels. (See Shelford on Wills, pp. 89, 90.)

Entailed estates were made by the statute *de donis* unalienable, and neither the issue nor the remainder-men could be barred; that consequence was soon found by experience productive of great inconveniences, by preventing forfeitures of estates, and taking away the power of raising money upon them for the purposes of trade and commerce, or as a provision for the younger children of families. And soon after the passing of that statute, which it was found impracticable to repeal, means were devised for breaking through it, by common recoveries, which were first established by a judicial determination in *Taltarum's* case, (2 Edw. 4, 14 & 19; Hardr. 209; Willes, Rep. 452.) Common recoveries were considered only as common assurances, and not at all as real transactions, being

surveys on record borrowed from the ecclesiastics (who invested them to evade the statutes of mortmain) in order to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee simple. (Willes Repts. 448, 551; 5 J. B. Moore, 607; 5 T. R. 109, n. See Shelford on Mortmain and Charities, pp. 12, 13.) As a common recovery pursued the forms of a real action, it was absolutely necessary that the vouchee against whom the judgment was obtained should have been living on the day when such judgment was given by the court, for otherwise the judgment was erroneous. (*Brooms v. Swan*, 3 Burr. 1595; 8 C. 1 Bl. Rep. 496, 526; 6 Br. P. C. 333; 2 Saund. 42.) The necessary information on this subject will be found in Cruise's Dig. vol. 5; 1 Preston's Convey.; Coventry's Treatise on Common Recoveries; Sheppard's Touchst., by Preston; *Doe d. Lumley v. Earl of Scarborough*, 3 Ad. & Ell. 1.

The law respecting fines and recoveries is every day becoming of less practical application; but some knowledge upon that subject is still required in the investigation of titles, and will lead to the better understanding of this statute. The general objects of fines and recoveries being clearly explained in the first report of the commissioners of real property, some extracts, with some variations and references, are added in the following note.

"A fine in its origin was an amicable composition, by leave of the king or his justices, of an actual suit, whereby the lands were acknowledged to be the right of one of the parties, and at common law all persons were barred by it who did not claim within a year and a day. The safe title acquired by this process led, it is supposed, to the practice of transferring lands by means of a fictitious suit of the same nature as the real suit above alluded to. This is the origin of the fines of the present day, which, subject to certain modifications made from time to time by statutes, have been in use for centuries. The bar by non-claim after a year and a day on fines at common law was taken away by the statute 34 Edw. 3, c. 16. The statutes 1 Rich. 3, c. 7, and 4 Hen. 7, c. 24, have declared, that a fine proclaimed in four successive terms, the first proclamation being made in the term in which the fine is engrossed, shall operate as a bar by non-claim at the end of five years after the last proclamation, but with a certain limited extension of time in the cases of infancy, coverture, lunacy, and absence beyond seas; and by the latter statute, and the statute 32 Hen. 8, c. 36, the further effect of barring estates tail was given to fines levied with proclamations. The two last statutes gave rise to a distinction between the fines levied with proclamations and fines levied without proclamations, the latter being fines at common law, and having those effects only which fines had immediately after the passing of the statute 34 Edw. 3, c. 16.

"There were four sorts of fines, viz. 1st, a fine '*Sur-conu-* Different sorts of fines.
ances de droit come ces, &c.;' 2dly, a fine '*Sur concessions de droit tantum*;' 3dly, a fine '*Sur concessit*;' and 4thly, a fine

'*Sur dons grant et render.*' The first and third were those in general use; the second was sometimes used, but the same purposes could be attained either by the first or third. The fourth had become obsolete. The first was always levied with proclamations, and so it seems was the fourth fine. But the second and third were usually levied without proclamations.

Operation of
fines.

"The three principal uses to which fines were applied were, to bar estates tail, and enable a tenant in tail to acquire or pass a base fee determinable on the failure of the issue in tail, (see stat. 32 Hen. 8, c. 36,) to gain a title by non-claim, (see *ante*, p. 128,) and to pass the estates and bar the rights of married women. (See note to section 91, *post*.) For the first two objects the first fine was usually resorted to. The last object was often accomplished by the first fine, sometimes by the second, but more frequently by the third, which was usually resorted to for conveying the life estates and interests of married women, and for creating terms of years to bind, by way of estoppel, their contingent or executory or other estates and interests. (See Co. Litt. 121, a. n.)

"A fine, according to the sort used, would also produce the following effects:—it would operate by estoppel in other cases beside the one above noticed; (see note to section 20, *post*); it would operate as a confirmation of all prior defeasible estates or charges made by the party levying it; it would release or extinguish rights, interests, and powers; (see note to section 34, *post*); it would destroy or extinguish contingent remainders and executory interests; it would create a discontinuance when levied by a tenant in tail in possession; (see *ante*, p. 227); it would revoke devises, (see Shelford on Wills, pp. 210, 212,) and when levied by a tenant for life or in tail after possibility of issue extinct, or by a tenant for years, or by a copyholder, it would produce a forfeiture; and when levied by a tenant in tail, with the immediate remainder or reversion in fee to himself, the base fee acquired by the fine would merge in the remainder or reversion, which would immediately become an estate in possession, and all the estates and charges made on the remainder or reversion not only by the tenant in tail himself, but also by those who were previously entitled to the remainder or reversion, would, in consequence of the merger, be let into possession, and become immediately available. (See note, section 39, *post*.)

Definition of
a common
recovery and
its origin.

"A common recovery was a judgment in a fictitious suit, in the nature of a real action, brought by the demandant against the tenant of the freehold, who vouched some person to warrant the lands, and judgment was given for the demandant to recover them against the tenant, in consequence of the person vouched, or the person last vouched, if there should be more than one vouchee, making default in defending the title to the lands, which title he was supposed to have warranted. In a recovery, the regular process of a real action was pursued throughout, and no compromise took place as in a fine. Common recoveries were invented by ecclesiastics in order to elude

the statutes of Mortmain, and were in constant use for that purpose until checked by the statute Westminster 2, 13 Edw. 1, c. 32. In consequence of the principles laid down in the 12 Edw. 4, in *Taltarum's* case, a common recovery was afterwards applied to the purpose of evading the statute of Westminster 2, 13 Edw. 1, c. 1, commonly called the statute *De Donis Conditionalibus*, by virtue of which the old common law estate of fee simple conditional was abolished, and the modern estate tail was introduced, with such restrictions, that the tenant in tail could not alienate the lands entailed, nor make them subject to his debts in the hands of his successors, nor were they liable to forfeiture for felony or treason, the last of which incident was, in those disturbed times, considered by the crown as a serious evil. In the long interval of nearly two hundred years between the passing of the statute *De Donis* and the application of recoveries to the evading of that statute, there was no contrivance, except that of warranty in a few cases, by which lands entailed could be unfettered. During that interval many attempts were made in parliament to procure the repeal of that statute, but without success, on account of the uniform opposition of the great landed proprietors. Awkward as was the contrivance of a recovery for unfettering lands entailed, yet it was considered a great boon to the public, because it removed the mischiefs which arose from the tendency of the statute *De Donis* to establish perpetuities.

"The principal use of a recovery was to enable a tenant in tail to bar not only his estate tail, but also all remainders, reversions, conditions, collateral limitations, and charges, not prior to the estate tail, and to acquire or pass a fee simple or an estate commensurate with the estate of the settlor; but a reversion vested in the crown could not, as it is generally understood, be barred by a recovery. (See section 18, *post*, and *note*.)

Operation of
a recovery.

"A recovery would produce other effects, viz. it would operate by estoppel, when suffered without a proper tenant to the *precipe*, or by persons having contingent, or expectant or other rights or interests, or by expectant heirs, and in some other cases so as to conclude the parties suffering it and all persons claiming under them, except issue in tail; it would operate as a confirmation of all prior estates or charges made by the tenant in tail who suffered it. (See note to sect. 38, *post*.) It would release or extinguish rights, interests, and powers; it would destroy or extinguish contingent remainders and executory interests; it would work a discontinuance to the issue in tail, if not duly suffered by tenant in tail; it would revoke devises. (See Shelford on Wills, 210, 212.) It would create a forfeiture in many cases, when suffered by a tenant for life, or by persons not having the freehold.

"Although it was not usual to suffer a recovery, except when it was necessary to bar entails and remainders over, yet when resorted to for those purposes, it was not unfrequently made use of at the same time to convey, release, bar or extin-

Necessary parties to a recovery for barring estates tail and remainders.

guish the estates, rights, powers, and interests of married women and others.

"In order to operate as a bar to an estate tail, and the remainders and reversion, it was necessary that a proper writ should be brought, and that there should be a demandant, tenant and vouchee. The writ must have been brought by the demandant against the person who had the immediate freehold, who was technically called the tenant to the *precipe*; for all actions to recover the seisin of lands, to be effectual, must be brought against the actual tenant of the freehold. Hence a tenant in tail, who had not himself the immediate freehold, must, in order to bar by a recovery the entail and the remainders and reversion, have procured the concurrence of the person who had the immediate estate of freehold. In consequence of the difficulties which frequently occurred in procuring a conveyance from lessees for lives to make a tenant to the *precipe*, their concurrence was dispensed with by the stat. 14 Geo. 2, c. 20; (21 Geo. 2, c. 11, Ireland;) and by the same statute the person entitled to the first estate for life, or other greater estate in reversion expectant on the lease, was made competent to make the tenant to the *precipe*, and was for that purpose considered as having the immediate estate of freehold. The common law required that a tenant to the *precipe* in a recovery should have the freehold before and at the time of judgment given. But the above-mentioned statute, 14 Geo. 2, c. 20, has made a recovery valid, if the freehold is vested in the tenant to the *precipe* before the end of the term, great session, session or assizes in which it was suffered, notwithstanding the fine or deed for making the tenant to the *precipe* should be levied or executed after the judgment had been given in such recovery, and the writ of seisin had been awarded. Thus it appears that the legislature had relieved common recoveries from one of the requisites in real adverse suits, and in doing so had incumbered them with a legal fiction. In a recovery by a tenant in tail, it was necessary that he should vouch some person to warranty. If the writ was brought by the demandant against the tenant in tail, and he vouched over another person, the recovery only barred the estate tail, of which the tenant in tail was then seised, and the remainders and reversion. This recovery was called a recovery with single voucher. If the writ was brought by the demandant against another person who had the immediate estate of freehold, and that person vouched the tenant in tail, and he vouched over another person, the recovery barred all estates tail of or to which the tenant in tail was or ever had been seised or entitled, and the remainders and reversion. This recovery was called a recovery with double voucher. If there were two estates tail existing at one time in distinct persons, the one being derived out of the other, a recovery with treble voucher was sometimes suffered, although the necessity of such a recovery was considered doubtful. In this case the writ was brought by the demandant against some person who

had the immediate estate of freehold, not being either of the tenants in tail, and that person vouched the tenant of the derivative estate tail, who vouched over the tenant of the original estate tail, and he vouched over another person. The person solely vouched, or last vouched, was always some officer of the court where the recovery was suffered, and he was called the common vouchee. It was not usual to suffer a recovery with single voucher. In the case of a recovery with double or treble voucher, the person having the first estate of freehold conveyed it to a stranger to make him tenant to the *precipe*; the tenant must have appeared in court, either personally or by attorney, and therefore some person in the habit of attending the court where the recovery was suffered was usually made the tenant, in order to save the expense and delay of a commission of *dedimus potestatem*, which must have been incurred if the tenant appeared by attorney. It was not necessary that the demandant should appear in court; but every vouchee must have appeared in court, either in person or by attorney. The demandant had judgment to recover the land against the tenant, and the tenant had judgment to recover of his vouchee land of equal value, in recompense for the land lost by his default; and if there were several successive vouchees, each person vouching had judgment to recover of his vouchee in like manner. The supposed recompense in value to the tenant and vouchee, or each successive vouchee except the last, was usually assigned as the reason why the issue in tail and the remainders and reversion were barred by a recovery.

"In consequence of its being required that the tenant to the *precipe* should have the freehold, great difficulties were frequently thrown in the way of barring entails, and occasionally serious mischiefs arose. So long as the freehold remained in the tenant for life, or, if there should be no tenant for life, in the tenant in tail, who were to suffer the recovery, there was no difficulty. But it often happened that the freehold was in a trustee, or had been alienated by the tenant for life or tenant in tail, and the person in whom it was vested could not be traced, or would refuse to concur in making the tenant; sometimes it was a question of construction whether the freehold was vested in trustees. If, under the impression that they had not the freehold, they were not made to join in the conveyance to the tenant, the recovery may be void. Not unfrequently, from omitting to investigate the title when a recovery was to be suffered, or from some other cause, it was not known that the freehold was in a trustee, or that it had been alienated, and from ignorance of this circumstance the recovery was void. These mischiefs could only be remedied by obtaining the concurrence of the person in whom the freehold was vested, and suffering a new recovery. If a recovery should be void for want of a proper tenant to the *precipe*, and the defect should not be discovered in the lifetime of the tenant in tail who suffered it, the evil was incurable, and the estate

Mischief arising from the necessity of the freehold being in the tenant to the *precipe*.

might be lost by the persons claiming under the recovery. (See 1 Prest. on Conv. p. 28.)

"When a tenant in tail in remainder was desirous of suffering a recovery, he was at the mercy of the person having the freehold, who had it in his power to withhold his assent. There were instances of this power being abused, and of the person having the freehold extorting from the remainder-man a consideration for his concurrence. This sometimes occurred when the freehold continued in the first tenant for life, who might or might not be connected with the remainder-man; but it more frequently occurred when the freehold was vested in an alienee, who was generally a stranger. There were cases in which great skill and caution must have been used in making the tenant to the *præcipe*, in order to preserve powers, rights, and interests, which might otherwise be prejudiced or extinguished, as the following examples will show. If a tenant for life conveyed to a tenant to the *præcipe* to enable a remainder-man in tail to suffer a recovery, he would, without caution, have extinguished the powers annexed to his estate for life, and let in upon his own estate the incumbrances of the remainder-man. The expedients adopted to prevent this mischief are extremely subtle and artificial. (See note to section 34, *post*.) By similar expedients, a tenant for life with a contingent remainder in tail, either to himself or his children, might assist a remote remainder-man in tail in suffering a recovery without destroying the contingent remainder. If a person having either an estate tail or an estate for life, with a contingent remainder to his children (but, as not unfrequently happened, it is doubtful which), was desirous of barring his supposed estate tail by a recovery, but at the same time wished to prevent the forfeiture of his supposed life estate and the destruction of the contingent remainder, a different contrivance, no less artificial, was resorted to. In recoveries of copyholds, most of these precautions were unnecessary. After the demandant had obtained judgment in a recovery, a writ of seisin was sued out, to be executed by the sheriff of the county where the lands lie, and he returned that he had executed the writ, and delivered seisin of the lands to the demandant. But this was a false return, for the writ was never executed, and seisin was never in fact delivered. So that while the law required that the demandant should recover against the actual tenant of the freehold, when he had recovered the lands, it failed in the final object of the action, namely, that of giving him possession. Thus the suit was to commence with all the formalities of a real action, but to end with dispensing with the only object of those formalities, namely, to give to the demandant the lands sued for."—(*First Report of Commissioners of Real Property, ordered by the House of Commons to be printed, 20 May, 1829, p. 20—25.*)

Base fee.

(b) The species of base fee here defined is thus described by Lord Coke: where tenant in tail bargains and sells the estate to another and his heirs, and afterwards levies a fine to

him and his heirs with proclamations, he has an estate in fee-simple as long as the tenant in tail has heirs of his body, derived out of the estate tail, this being an inferior and subordinate estate, a remainder or reversion may be expectant upon it. (*Seymour's case*, 10 Rep. 97 b, 98 a; see 2 Ld. Raym. 1148; Plowd. 557; Co. Litt. 18; Shep. T. 46, 103, 402; 3 Leon. 117; 1 Prest. on Estates, 431, 2.) Thus, suppose A. being tenant in tail general, levied a fine with proclamations, the estate tail was converted into a base or determinable fee, which would subsist as long as there was any issue inheritable under the intail, and on the failure of such issue, the person next in remainder after the estate tail was entitled to enter. It was clearly settled that a release or bargain and sale by a tenant in tail gave a base fee, voidable by the issue in tail. (*Machel v. Clark*, 2 Ld. Raym. 779; S. C. Salk. 619; Com. 120; 7 Mod. 18; 11 Mod. 19; *Goodright d. Tyrrell v. Mead*, 3 Burr. 1703; *Seymour's case*, 10 Rep. 95; *Doe d. Neville v. Risers*, 7 Term Rep. 276.)

(c) The word *divest* signifies nothing more than a mere deprivation of the possession. (Cow. Dict.) But the words *put to a right*, have a more extensive signification, as they mean a deprivation, not only of the possession, but also of the right of possession; for when an estate is turned to a right, the owner has only the *jus proprietatis*, or mere right of property, which could not be regained by a possessory, but only by a real action. (See 1 Burr. 107; 1 Taunt. 578, 588; 1 T. R. 738; Butl. Co. Litt. 239 a, n. (1).)

(d) It has been established ever since the time of Lord Coke (Sir *Edward Clere's case*, 6 Rep. 18,) that where a power of appointment over real estate is executed, that the appointee takes under him who created the power, and not under him who executes it. The estates limited in default of and until the execution of the power are defeated by an appointment, for the execution of a power is the limitation of a use under and by the effect of the instrument by which the power was reserved. Thus in the ordinary case of a marriage settlement, with a power to the tenants for life of leasing for twenty-one years, when the tenant for life executes the power, the effect is not technically making a lease; but such lessee in fact stands precisely in the same relation to all the persons named in the first settlement, as if that settlement had contained a limitation to his use for twenty-one years antecedent to the life estate and the subsequent limitations. (*Maundrell v. Maundrell*, 10 Ves. 255, 256; see Co. Litt. 216 a, 241 a, notes by Butl.) It has been held that a right of dower, which had attached before the execution of a power, was defeated by an appointment. (*Ray v. Pung*, 5 B. & Ald. 661; 8 C. 5 Madd. 310.) So where an estate was limited to such uses as a purchaser should appoint, and subject thereto, to the usual uses to bar dower, an appointment made under the power, would in equity as well as at law, overreach any judgments, which might in the mean time have been entered

Relation of
appointment
to deed
creating a
power.

up against the purchaser, and the circumstance that the appointee took with notice of the judgments, would make no difference in this respect. (*Skeels v. Shearly*, 3 My. & Cr. 112; 8 Sim. 153; *Eaton v. Sanster*, 6 Sim. 517; *Doe d. Wigan v. Jones*, 10 B. & C. 459; *Tunstall v. Trappe*, 3 Sim. 300.) An important alteration has been effected by the stat. 1 & 2 Vict. c. 110, s. 11, (3 & 4 Vict. c. 105, s. 19, Ireland,) with respect to defeating judgments by the execution of a power, for that statute authorises execution against the real estates of the owner, over which, at the time of entering up judgment, or at any time afterwards, he had any disposing power which he might, *without the assent* of any other person, exercise for his own benefit. But in such a case, if the appointee is a purchaser or mortgagee, *without notice* of the judgment, then it may be defeated by an appointment, in consequence of the 5th section of the stat. 2 & 3 Vict. c. 11. An exception to the above rule, that the appointee takes under the deed creating the power, is, where the person executing the power has granted a lease or any other interest, which he may do by virtue of his estate, for them he is not allowed to defeat his own act. (*Saape v. Turton*, Sir W. Jones, 392; *Yelland v. Fielis*, Moore, 788; *Goodright v. Cator*, Dougl. 477.) Thus where an estate was limited by a marriage settlement to trustees, to the use of the settlor *for life*, with remainders over, and with a power to the settlor, with the consent of the trustees, to revoke all the uses in the settlement, and the settlor having granted an estate *for his own life* in the settled estate, a revocation subsequent thereto *of all the uses* by him, with the consent of the trustees, will not affect the estate granted for his life for a valuable consideration. (*Goodright v. Cator and others*, Dougl. 477; see Gilb. on Uses, 142; *Edwards v. Slater*, Hardr. 415.) An appointment has not relation in point of time, so as to make the appointee take from the time of the creation of the power; thus in the case of *The Duke of Marlborough v. Godolphin*, 2 Ves. sen. 61, Lord Sunderland left the interest of 30,000*l.* to his wife for her life, and the principal, after her decease, to such of her children as she should by deed or will appoint. By her will she appointed 2000*l.* to Mr. Spencer, and 1500*l.* to Lady Morpeth, who both died in her lifetime. It was contended, that the appointment related back to the time of Lord Sunderland's will, which relation would overreach the death of the two parties, who were alive at the time of the death of the testator, Lord Sunderland; and then it would be considered as vesting in them in their lives. But Lord Hardwicke said, that nothing vested in them during their lives, and consequently that nothing was transmissible to their representatives; because every person claiming under the execution of a power, must claim not only according to the execution of the power, but according to the nature of the instrument by which that power is executed; and therefore a will, in execution of such a power, being always revocable, it

is not complete till the death of the testatrix; although an appointment by deed, even with a power of revocation, would have vested the sums from the time of its execution. (See 1 Ves. sen. 139; 2 Ves. sen. 612; *Lisle v. Lisle*, 1 Br. C. C. 533.) A deed of appointment of lands in a register county was postponed to a mortgage made after it, which was registered both before the deed creating the power and the appointment. (*Scrafton v. Quincey*, 2 Ves. sen. 413.) It is in general clear, where a party having both an authority and an interest does an act, purporting an intention to pass the interest, he shall be held to intend that, and not to exercise his authority. (10 Ves. 258; see Sugd. on Powers, c. 5, s. 6.)

FINES AND RECOVERIES.

Abolition Clause.

II. And be it further enacted, that after the thirty-first day of December, one thousand eight hundred and thirty-three, no fine shall be levied or common recovery suffered of lands of any tenure, except where parties intending to levy a fine or suffer a common recovery shall, on or before the thirty-first day of December, one thousand eight hundred and thirty-three, have sued out a writ of dedimus, or any other writ, in the regular proceedings of such fine or recovery; (e) and any fine or common recovery which shall be levied or suffered contrary to this provision, shall be absolutely void.

No fine or recovery to be levied or suffered after the 31st of Dec. 1833.

(e) It will be observed that no time is prescribed for completing the fine or recovery.

Provision as to Covenants to levy Fines, &c.

III. And be it further enacted, that in case any person shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable to levy a fine or suffer a common recovery of lands of any tenure, or to procure some other person to levy a fine or suffer a common recovery of lands of any tenure, under a covenant or agreement already entered into or hereafter to be entered into, before the first day of January, one thousand

Persons liable after 31st Dec. 1833, to levy fines or suffer recoveries under covenants to effect the purposes intended by means of this act; but in any case where the purpose of a

fine or recovery cannot be so effected the persons liable to levy fines or suffer recoveries shall execute a deed which shall have the same operation as the fine or recovery.

eight hundred and thirty-four, then and in such case, if all the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, the person liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant or agreement to make or to procure to be made such a disposition under this act as will effect all the purposes intended to be effected by such fine or recovery; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant or agreement to make or procure to be made such a disposition under this act as will effect such of the purposes intended to be effected by such fine or recovery as can be effected by a disposition under this act; and in those cases where the purposes intended to be effected by such fine or recovery, or any of them, cannot be effected by any disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable under such covenant or agreement to execute or to procure to be executed some deed whereby the person intended to levy such fine or suffer such recovery shall declare his desire that such deed shall have the same operation and effect as such fine or recovery would have had if the same had been actually levied or suffered; and the deed by which such declaration shall be made shall, if none of the purposes intended to be effected by such fine or recovery can be effected by a dispo-

ation under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered ; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the deed by which such declaration shall be made shall, so far as the purposes intended to be effected by such fine or recovery cannot be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered.



ANCIENT DEMESNE.

Reversal of Fines, &c.

IV. And be it further enacted, that no fine already levied in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no fine hereafter to be levied of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor ; and the court shall order such fine to be vacated only as to the lord of the said manor ; and every such fine which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid shall still remain as good and valid against and as binding upon the consors thereof, and all persons claiming under them, as such fine would have been if the same had not been reversed by such writ of deceit as aforesaid ; and no common recovery already suffered in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no common recovery hereafter to be suffered of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor

Fines and recoveries of lands in ancient demesne, when levied or suffered in a superior court, may be reversed as to the lord by writs of deceit, the proceedings in which are now pending, or by writs of deceit hereafter to be brought, but shall be as valid against the parties thereto, and persons claiming under them, as if not reversed as to the lord.

of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such recovery to be vacated only as to the lord of the said manor; and every such recovery which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid shall still remain as good and valid against and as binding upon the vouchees therein, and all persons claiming under them, as such recovery would have been if the same had not been reversed by such writ of deceit as aforesaid. (f)

Tenure by
ancient de-
mesne.

(f) All those estates which are called in Domesday book *terra regis*, were manors belonging to the crown, being part of its ancient demesne; a great portion of the lands comprised within those manors was in the hands of tenants who held the same of the crown by a peculiar species of socage tenure, which has long been known by the appellation of *ancient demesne*, (4 Inst. 269, 270,) which can only subsist in manors of that sort. Whether ancient demesne or not can only be determined by a reference to Domesday Book. (Dyer, 250; 2 Burr. 1046. See 2 Scriven on Cop. 687—714, 3d ed.; Com. Dig. Ancient Demesne; and Third Real Property Report, 12, 13.) The tenants in ancient demesne were subject to certain restraints, and entitled to certain immunities. They could not bring or defend any real action touching their tenements, except in the lord's court. Hence the title to lands of that tenure are frequently involved in considerable difficulties, in consequence of fines or recoveries having by mistake been levied or suffered in the court of Common Pleas. "A fine or recovery of lands of this tenure ought to be levied or suffered in the court of the manor of which the lands are held. As, however, the lands are within the jurisdiction of the courts at Westminster, a fine or recovery in the court of Common Pleas is not void, but only voidable. The consequence of this is, that the lands become frank free till the lord by means of a writ of deceit reverses the fine or recovery; after the reversal the lands are restored to the ancient tenure, and the fine or recovery is rendered void, not only as to the lord, but also as to the parties, and all the persons claiming under them. Till the reversal, the parties are absolutely bound by the fine or recovery, and there is no method by which the lord can be compelled to bring his writ of deceit and, according to the prevailing opinion, there is no limit to his right to bring it; and the parties themselves, however so disposed, cannot rectify the

Effects of
fines and re-
coveries in
the C. P. of
lands in
ancient de-
mesne.

error. Although a release from the parties would be effectual to extinguish their rights, yet, according to the better opinion, no subsequent fine or recovery can be levied or suffered in the lord's court, nor can the tenant claim any protection from the lord, or any right depending on the tenure, till the reversal of the fine or recovery in the court of Common Pleas, nor can the tenant have any effectual dealing with the lands as frank fee, till the lord has released his seignory. Therefore, till the reversal of the fine or recovery, or the release of the seignory, the title is unmarketable. The principles of justice require that a fine or recovery in the court of Common Pleas of lands in ancient demesne should, when reversed by the lord, still remain good against all persons except him. Another mischief arising from the conversion into frank fee of lands of the tenure of ancient demesne, by levying a fine or suffering a recovery in the superior court, is, that the owner, not being aware of the effect produced by such fine or recovery, afterwards, and before the same is reversed, levies a fine or suffers a recovery in the lord's court, which, according to the better opinion, is void, on the ground of its having been *coram non iudice*. Fines and recoveries are not unfrequently levied and suffered in the superior court, not from any wish to defraud the lord of his tenure, but from the circumstance of the legal advisers of the parties not knowing that the lands are of the tenure of ancient demesne; for it often happens that, previously to a fine or recovery, the title to the land is not investigated; or there may be nothing appearing on the abstract to show that the lands were of that tenure. The law in this case is, therefore, harsh and inconvenient. A fine or recovery levied or suffered in the court of Common Pleas of lands in Wales, (before the stat. 1 Will. 4, c. 70,) or in a county palatine, is absolutely void, and therefore works no mischief. This principle may be a good one as to lands in those jurisdictions, because the boundaries are well known and defined. But, for the reason above given, it could not be made to apply to lands held in ancient demesne." (1st Real Property Report, 28, 29.)

Defect of Jurisdiction.

V. And be it further enacted, that if at any time before or after the passing of this act a fine or common recovery shall have been levied or suffered, or shall be levied or suffered in a superior court, of lands of the tenure of ancient demesne, and subsequently to the levying or suffering thereof a fine or common recovery shall have been or shall be levied or suffered of the same lands in the court of the lord of the manor of which the lands had

Fines and recoveries of lands in ancient demesne levied or suffered in the manor court, after other fines and recoveries in a superior court shall be as valid as if

the tenure
had not been
changed.

been previously parcel, and the fine or common recovery levied or suffered in such superior court shall not have been reversed previously to the levying of the fine or the suffering of the common recovery in the lord's court, then and in every such case the fine or common recovery levied or suffered in the lord's court shall, notwithstanding the alteration or change of the tenure by the fine or common recovery previously levied or suffered in the superior court, be as good, valid, and binding as the same would have been if the tenure had not

Fines and recoveries shall not be invalid in other cases, though levied or suffered in courts whose jurisdictions may not extend to the lands therein comprised.

been altered or changed; and that in every other case where any fine or common recovery shall at any time before the passing of this act have been levied or suffered in a court whose jurisdiction does not extend to the lands of which such fine or recovery shall have been levied or suffered, such fine or recovery shall not be invalid in consequence of its having been levied or suffered in such court, and such court shall be deemed a court of sufficient jurisdiction for all the purposes of such fine or recovery; and in every other case where persons shall have assumed to hold courts in which fines or common recoveries have been levied or suffered, and such courts shall be unlawful or held without due authority, the fines or common recoveries which at any time before the passing of this act may have been levied or suffered in such unlawful or unauthorized courts shall not be invalid in consequence of their having been levied or suffered therein, and such courts shall be deemed courts of sufficient jurisdiction for all the purposes of such fines or recoveries.

Tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior court, restored in cases in which

Tenure of ancient Demesne restored.

VI. And be it further enacted, that in every case in which at any time, either before or after the passing of this act, the tenure or* ancient demesne has been or shall be suspended or destroyed by the levying of a fine, or the suffering of a common recovery of lands of that tenure in a superior

* *Legs of.*

court, and the lord of the manor of which the lands at the time of levying such fine or suffering such recovery were parcel, shall not reverse the same before the first day of January one thousand eight hundred and thirty-four, and shall not by any law in force on the first day of this session of parliament be barred of his right to reverse the same, such lands, provided within the last twenty years immediately preceding the first day of January one thousand eight hundred and thirty-four, the rights of the lord of the manor of which they shall have been parcel shall in any manner have been acknowledged or recognized as to the same lands, shall, from the said first day of January one thousand eight hundred and thirty-four, again become parcel of the said manor, and be subject to the same heriots, rents, and services as they would have been subject to if such fine or recovery had not been levied or suffered; and no writ of deceit for the reversal of any fine or common recovery shall be brought after the thirty-first day of December one thousand eight hundred and thirty-three.

the rights of the lord of the manor shall have been recognized within twenty years.

THE AMENDMENT OF FINES AND RECOVERIES, &c.

Errors in Fines.

VII. And be it further enacted, that if it shall be apparent, from the deed declaring the uses of any fine already levied or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there

Fines made valid without amendment.

had been no such error, misdescription, or omission (g).

Cases of
amendment
of fines.

(g) The court refused to amend a fine by substituting for the name of one parish mentioned by mistake in the fine the name of another parish in which, according to the deed to lead the uses, the premises were situated; the court observing, that if the application were acceded to, it would be in the same situation as before the act, and be called on to amend upon every conveyancer's doubt, and all the expense would be incurred which the act was passed to prevent. (*Lockington, dem. Shipley and wife*, consors, 1 Bing. N. R. 355.) Fines of consor's lands in G. and any other adjoining parish were amended by inserting the parish of R., an adjoining parish, in which the consor had land, which had gone according to the deed to lead the uses. (*Totton, dem. Vincent defor.*, 5 Bing. N. C. 626.) The court amended a fine levied at the *Carmarthen* great sessions, in 1830, by indorsing the first and third proclamations, of which there was no entry, it appearing that such proclamations had been made, but the entry of them omitted by the clerk of the court. (*Lloyd, dem. Nicholas, defor.*, 4 Bing. N. C. 633; 6 Scott, 355.) In another case a similar amendment was made of a fine levied in 1771, at the great sessions for the county of Cardigan, upon the affidavit of the clerk to the deputy-prothonotary of that court, to the effect that the proclamations were always duly made according to the practice of the court, but very often not registered; and on the affidavit of the surviving deforciant that the fine was intended between the parties, she (the survivor) now wishing to transmit a good title to a purchaser, and although no affidavit was produced of the fact of the proclamations in this particular case. (*Price v. Watkins*, 6 Jurist, 170.) A fine was levied at the autumn great sessions held for the county of Cardigan in 1830: the roll of fines levied at those sessions was then proclaimed, and also at the autumn assizes for that county in 1831; and it appeared that the fine was then upon the proper roll. There was no evidence as to any proclamation having been made at the spring assizes, 1831; and there was no indorsement of any of the proclamations, the officer whose duty it was to indorse them on the roll having omitted to do so. The court allowed the proclamations to be indorsed by the clerk of the peace, into whose hands the records of fines for the county of Cardigan, by the 11 Geo. 4, and 1 Will. 4, c. 70, came on the death of the late deputy-prothonotary, and this after an ejectment brought to recover the premises comprised in the fine. (*Evans, dem. Davis, defor.*, 3 Jurist, 223; 5 Bing. N. C. 229; 7 Dowl. P. C. 259; 6 Scott, 372.)

Errors in Recoveries.

VIII. And be it further enacted, that if it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission (*h*).

Recoveries made valid without amendment.

(*h*) A recovery was amended under 3 & 4 Will. 4, c. 74, s. 8, by inserting the words "*right of free warren*," the right having always gone with the property in question, and the deed to lead the uses conveying all hereditaments. (*In re Twissell's Recovery*, 4 Bing. N. R. 253; 5 Scott, 638.)

In a recovery the court of C. P. will not allow the christian names of the vouchee (erroneously transposed in the warrant of attorney) to be made right, amendments never being allowed in that instrument. (*Lamont*, vouchee, 3 Scott, 666; 3 Bing. N. C. 297.) Where the deed to lead the uses of a recovery is sufficient to cover all the lands intended to be passed, an application to amend the recovery by inserting the name of the parish is unnecessary. (*Re Watkins*, 9 Dowl. P. C. 58.) The court refused to permit an old recovery to be amended by the insertion of a parish, the words of the deed being large enough to embrace it, and the omission being consequently cured by 3 & 4 Will. 4, c. 74, s. 8. (*Evans*, vouchee, 2 Scott's N. R. 83.)

Cases where the court refused to amend recoveries.

See further, as to the amendment of fines and recoveries, Cruise, Dig. tit. xxxv. c. 5, xxxvi. c. 6; 2 Wms. Saund. 94.

Jurisdiction to amend saved.

Saving jurisdiction in cases not provided for.

IX. Provided always, and be it further enacted, that nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, in cases not provided for by this act.

Defect of Tenant to the Præcipe, Non-inrolment of Bargain and Sale.

Recoveries made valid in certain cases where bargain and sale is not duly inrolled.

X. And be it further enacted, that no common recovery already suffered or hereafter to be suffered shall be invalid in consequence of the neglect to inrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly inrolled.

Defect of Legal Tenant to Præcipe.

Recoveries invalid in consequence of there not being proper tenants to the writs of entry made valid in certain cases.

XI. And be it further enacted, that no common recovery already suffered or hereafter to be suffered shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery, provided the person who was the owner of or had power to dispose of an estate in possession, not being less than an estate for a life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits, after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ; (i) and an estate shall be deemed to be an estate in possession notwithstanding there shall be sub-

existing prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved. (k)

(i) Fines and recoveries were levied or suffered of equitable estates, and had, with a few exceptions, the same operation as they would have had if the estates had been legal; but neither a fine nor a recovery of an equitable estate produced a forfeiture of a particular estate, or destroyed contingent interests, except in the instance of a recovery suffered by an equitable tenant in tail, which would bar the entail, and all interests to take effect on the determination or in derogation thereof. Fines and recoveries of equitable estates must have been levied and suffered in the same courts, and with the same formalities, as those of legal estates; but there was some difference between legal and equitable recoveries, so far as regarded the tenant to the *precipe*. (See 1st Real Property Rep. p. 29.)

Equitable
fines and
recoveries.

It had been established that an equitable estate for life and a legal remainder in tail would not unite, so as to make a good recovery; and that in order to make a good tenant to the *precipe* there should have been a legal estate for life, with a legal remainder in tail, or an equitable estate for life, with an equitable remainder in tail. (*Shapland v. Smith*, 1 Br. C. C. 73; *Salvin v. Thornton*, Id. 73. n.; 8 C. Amb. 545. See *Jones v. Pearman*, 3 B. & C. 811; 4 B. & Ad. 55; 1 Collect. Jurid. 214.) A recovery suffered by an equitable tenant for life with a legal remainder in tail was void. Thus where an estate was conveyed to a purchaser and his trustee and their heirs, to the use of the purchaser and trustee and the heirs and assigns of the purchaser for ever, it was held that a recovery suffered by a devisee in tail under the will of the purchaser after his death, but in the lifetime and without the concurrence of the trustee, in whom the legal estate of freehold for life was vested, was bad, as the tenant in tail had no legal estate in her, except a remainder in tail expectant on the determination of the trustee's life estate and an equitable estate during his life. (3 B. & Cr. 799.) But an equitable remainder in tail might have been barred although the person making the tenant to the *precipe* had the legal estate. (3 Ves. 125.) Where a legal tenant in tail conveyed his estate to a trustee or mortgagee, and was afterwards desirous of suffering a recovery, the concurrence of his alienee in making a tenant to the *precipe* was necessary, and the recovery without it would not have been effectual. But this rule was held not applicable by analogy to trust estates, and therefore if equitable tenant in tail with equitable remainder over conveyed his interest to another person and his heirs by way of mortgage, or upon such trusts as left the ultimate beneficial ownership in

himself, a recovery suffered of the secondary equitable estate was valid without the concurrence of the mortgagee or trustee in the conveyance making the tenant to the *præcipe*. (*Nouaille v. Greenwood*, Turn. & Russ. 26. See *Casborne v. Scarfe*, 1 Atk. 603.)

What requisite in making legal tenant to the *præcipe*.

To make a legal tenant to the *præcipe* it was absolutely necessary that there should be possession by seisin in fact or in law; but the equitable owner never had the legal seisin, often not the actual possession, and very frequently not even the right to call for either. In the one case, if it were shown that the possession was not in the party, and consequently would not pass from him, the purpose of the conveyance was frustrated, no legal freehold being acquired; but in the other case it was not the object, nor could ever be the effect of the conveyance, to transfer the possession, but only to pass the equitable interest; and therefore an equitable recovery was held to be valid though the tenant in tail was not at the time in the actual receipt of the rents, which a trustee had paid over to others under a decree which was afterwards reversed. (*Lord Grenville v. Blyth*, 16 Ves. 224.) The possession and the right to it are presumed to go together till the contrary is shown, and the rightful owner will not be held out of possession unless it be shown that some other person has adversely obtained possession at the time of executing the deed making the tenant to the *præcipe*. (*Pigott v. Waller*, 7 Ves. 122.) Nothing short of a disseisin or intrusion can prevent the freehold in law from remaining in the party entitled to it, and a person not having an estate of freehold cannot suffer a recovery, though in possession. Where a tenant in tail in remainder expectant on an estate for life had obtained possession of the settled estate under a judgment in an action of ejectment, and during the life of the tenant for life made a feoffment with livery of seisin to a third party to make him tenant to the *præcipe* for suffering a common recovery, in which the tenant in tail was vouched, it was held that the taking possession under the judgment in ejectment did not amount to a disseisin of the freehold, as there was no *tortious ouster*, (see *Litt. s. 279*; *Co. Litt. 153*;) and that the feoffment without the concurrence of the jointress did not make a good tenant to the *præcipe*, and that the recovery was void, because there was no disseisin of the jointress, nor *ouster* of her freehold; that the feoffment was made really under an idea of having a right to suffer a recovery, and not with an intention to constitute a disseisin, and that if it were done with that intention, it amounted to a feoffment in *form* only, and was not such a feoffment as was in use of old; no transmutation of the possession passed by it, but its object being secret and collusive, it ought not to work a constructive disseisin. (*Taylor dem. Atkins v. Horde*, 1 Burr. 60; *S. C. Cowp. 689*; 6 Br. P. C. 633, Toml. ed.; see *Butl. Co. Litt. 330, b. n.*) It is a general rule that unless the persons entitled to the actual possession

of the land concur in a feoffment, it will not defeat their interest. (*Doe d. Maddock v. Lynes*, 3 B. & C. 388.)

If a tenant in tail, after having assigned dower, suffered a recovery without the concurrence of the widow, it was void as to the part assigned, for want of a good tenant to the *precipe*. (*Row v. Power*, 2 Bos. & Pul. 1.) But a dowress who had not entered was not a necessary party to a recovery. (4 Br. C. C. 525. See Gilb. Ten. 26; 5 Cru. Dig. p. 276, pl. 18.) So where tenant in tail conveyed his estate to the use of himself and his intended wife for their lives, with remainder to the heirs of their bodies, and after marriage the husband alone suffered a recovery, it was held to bar but a moiety, and to be a severance of the joint estate. (*Moody v. Moody*, Amb. 649. See Co. Litt. 187; 2 Br. C. C. 180.) So where there were two joint tenants of a manor, and a writ of entry of the whole manor was brought against one of them, on which a common recovery was suffered, it would only be good for the moiety of the person against whom the writ was brought, but as to the other moiety, it would be void for want of a tenant to the *precipe*. (*Winchester's case*, 3 Rep. 1; *Collyer v. Mason*, 2 Brod. & Bing. 685.) The above clause in the act will not, it is conceived, be applicable to cases similar to the three last cited.

(k) Allusion has been already made to the stat. 14 Geo. 2, c. 20, which dispensed with the concurrence of persons holding freehold leases in making tenants to the *precipe*. (See *ante*, p. 278.)

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Remedial Clauses qualified.

XII. Provided always, and be it further enacted, that where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and where any fine or common recovery shall before the passing of this act have been reversed as to some only of the parties thereto, or as to some only of the lands therein comprised, such fine or recovery shall not be rendered valid by this act so far as the same shall have been reversed; and where any person who would have been barred by any fine or common recovery, if valid, shall before the passing of this act have had any dealings with the lands comprised in such fine or recovery on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this act; and this act shall

Certain cases in which fines and recoveries shall not be made valid by this act.

not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this act be in possession in respect of any estate which the fine or common recovery, if valid, would have barred, nor any fine or common recovery which, before the passing of this act, any court of competent jurisdiction shall have refused to amend; nor shall this act prejudice or affect any proceedings at law or in equity, pending at the time of the passing of this act, in which the validity of such fine or recovery shall be in question between the party claiming under such fine or recovery and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this act; and if such proceedings shall abate or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this act would have a right of action or suit by reason of the invalidity of such fine or recovery shall retain such right, so that he commence proceedings within six calendar months after the death of such party.

CUSTODY OF THE RECORDS OF FINES AND
RECOVERIES.

As to the records of fines and recoveries in the courts of Common Pleas at Westminster and Lancaster, and the court of Pleas at Durham, after the 31st of Dec. 1833.

XIII. And be it further enacted, that after the thirty-first day of December one thousand eight hundred and thirty three, the records of all fines and common recoveries levied and suffered in his Majesty's court of Common Pleas at Westminster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said court of Common Pleas shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in his Majesty's court of Common Pleas at Lancaster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as his Majesty's justices of assize for the county palatine

of Lancaster for the time being shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in the court of pleas of the county palatine of Durham, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said court of pleas shall from time to time order or direct; and in the meantime the said records and proceedings shall remain in the same places respectively where they are now deposited, and be kept by the respective persons who would have continued entitled to the custody thereof if this act had not been passed; and while the said records and proceedings respectively shall be kept by such persons respectively, searches may be made and extracts and copies obtained as heretofore, and on paying the accustomed fees; and when any of the records and proceedings shall, by the order of the court or justices having the control over the same, be kept by any other person, then, so far as relates to the records and proceedings in the custody of such other person, searches may be made and extracts or copies obtained at such times and on paying such fees as shall from time to time be ordered by the court or justices having the control over the same; and the extracts or copies so obtained shall be as available in evidence as they would have been if obtained from the person whose duty it would have been to have made and delivered out the same if this act had not been passed. (1)

(1) By 5 & 6 Will. 4, c. 82, the offices in the court of Common Pleas connected with fines and recoveries are abolished. The records and documents concerning the duties of such offices are to be transferred to the officer of the court of Common Pleas appointed under 3 & 4 Will. 4, c. 74, for registering the certificates of acknowledgment of married women subject to the order of that court. (s. 2.) The business of the abolished offices is transferred to the same officer. (s. 3.) Searches may be made and copies taken of the records and documents, which copies and extracts, signed by the same officer, shall be as available in evidence and as effectual as the same would have been if signed by the officers of such abolished offices.

WARRANTY.

Estates tail,
and estates
expectant
thereon, no
longer barre-
ble by war-
ranty.

XIV. And be it further enacted, that all warranties of lands which after the thirty-first day of December one thousand eight hundred and thirty three shall be made or entered into by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail. (m)

(m) See *ante*, p. 185, s. 39, p. 228, n.

ALIENATION OF ESTATES TAIL.

General enabling Clause.

Power, after
the 31st of
Dec. 1833, to
dispose of
lands entailed
in fee simple
or for a less
estate, saving
the rights of
certain per-
sons.

XV. And be it further enacted, that after the thirty-first day of December one thousand eight hundred and thirty-three, every actual tenant in tail, (n) whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons,* including the King's most

* The remainder of the corresponding clause in the *Irish* act, 4 & 5 Will. 4, c. 92, s. 12, runs thus: "whose estates are to take effect after the determination or in defeasance of any such estate tail, including the King's most excellent Majesty, his heirs and successors, as regards the title to his Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, or where the title to the crown shall have accrued by any other means; saving always the rights of all persons in respect of estates

excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail: saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.(o)

prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this act authorized to be made."

(u) Actual tenant in tail means exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right. (*Ante*, s. 1, p. 271.) By letters patent, King Charles the Second, in the 25th year of his reign, in consideration of natural love and affection, granted an estate tail in certain lands to his illegitimate son, H. F., afterwards created Duke of Grafton. It was held that such estate and all other estates tail and remainders, and reversions thereupon expectant or depending, were effectually barred and extinguished by indentures of bargain and sale under 3 & 4 Will. 4, c. 74, s. 15, notwithstanding the stat. 34 & 35 Hen. 8, c. 20. (*Duke of Grafton v. London and Birmingham Railway Company*, 6 Scott, 719. See Com. Dig. Estates, B 31; Bac. Abr. Fines and Recoveries, 2d division, C.)

Reversion in crown barred by conveyance under this act.

(o) A tenant for life in possession with a remote remainder in tail, could by a recovery with double voucher bar such entail, but without prejudice to the intermediate interests between his estate for life and remainder in tail. (*Smith v. Clifford*, 1 Term Rep. 738; *Meredith v. Leslie*, 6 Br. P. C. 338; see *Dos d. Lumley v. Earl of Scarborough*, 3 Ad. & Ell. 42.)

A rent being an incorporeal hereditament, and susceptible of the same limitations as other hereditaments, may be granted or devised for life or in tail with remainders or limitations over. But there is a difference between an entail of lands and an entail of rent; that the tenant in tail of lands, with the immediate reversion in fee in the donor, might, by a common recovery, bar the entail and reversion; whereas the grantee in tail of a rent *de novo* without a subsequent limitation of it in fee, acquired by a common recovery only a base fee, determinable upon his decease, and failure of the issue in tail: but if there was a limitation of it in fee after the limitation in tail, the recovery of the tenant in tail gave him the fee simple. (*Smyth v. Farnaby*, Carter, 52; Sid. 285; 2 Keb. 29, 56, 84; *Weeks v. Peach*, Lutw. 1218, 1224; S. C. Salk. 577; *Chaplin v.*

Chaplin, 3 P. Wms. 229; Butl. Co. Litt. 298 a, n. 2; 1 Pre on Conv. 3.)

It will deserve consideration whether a tenant in tail, by assurance under this act of a rent *de novo*, without any limitation in fee on its original creation, will acquire more than base fee, as he would have done by a recovery; the act makes no distinction between a tenant in tail of land and of rent. See *ante*, pp. 270, 271.

Ex Provisione Viri, &c. Restraining Clause.

Power of disposition not to be exercised by women tenants in tail *ex provisione viri*, under 11 Hen. 7. c. 20, except with assent.

XVI. Provided always, and be it further enacted that where under any settlement made before the passing of this act, any woman shall be tenant in tail of lands within the provisions of an act passed in the eleventh year of the reign of his Majesty King Henry the Seventh, intituled "Certain Alienations made by the Wife of the Lands of the deceased Husband shall be void," the power of disposition hereinbefore contained as to such lands shall not be exercised by her except with such assent as, if this act had not been passed, would under the provisions of the said act of King Henry the Seventh, have rendered valid a fine or common recovery levied or suffered by her of such lands (*p*).

The stat. 11 Hen. 7, c. 20, and construction of it.

(*p*) By stat. 11 Hen. 7, c. 20, (confirmed by stat. 32 Hen. 8, c. 36, s. 2,) "if any woman who has any estate in *dower* or for *life*, or in *tail jointly* with her husband, or *only to herself*, or to *her use*, in any lands or hereditaments of the *inheritance* or *purchase of her husband*, (Co. Litt. 326, b.,) or given to the husband and wife in tail or for life, by any of the *ancestors of the husband*, or by any other person seised to the use of the husband, or of his ancestors, shall hereafter, being *sole*, or with any *after-taken husband*, discontinue, alien, release, or confirm with warranty, or by *covin* suffer any recovery of the same against them or any of them, or any other seised to their or either of their use; all such recoveries, discontinuances, alienations, releases, confirmations, and warranties shall be utterly void and of none effect." And a right of entry is given to the persons entitled to the estate, and if such alienation were made by such wife and her second husband, such entry may be made during his life, but after his decease such women may re-enter and enjoy according to their *first* estate; but women if sole at the time of such alienation are barred,

and an immediate right of entry is given to the persons entitled. The statute excepts discontinuances and recoveries made with the consent of the persons next entitled to the inheritance, and preserves the widow's right to *alien* for the term of her *life only*. The last-mentioned statute extends not only to cases in which the gift is confined to the issue of the husband, (*Foster v. Pitfal*, Cro. Eliz. 2, 524,) but to a limitation to the heirs of the body of the wife in tail general, with a remainder or reversion in favour of the husband or his ancestors. (*Symson v. Turner*, 1 Eq. Cas. Abr. 220; see *Gretton v. Howard*, 6 Taunt. 94, S. C. 2 Marsh. 9.) Where an estate is settled partly in consideration of the marriage, and partly in consideration of money paid, the consideration of marriage will prevail and bring the case within the statute. (*Villars v. Beaumont*, Dyer, 146 a; *Watkins v. Lewis*, 1 Russ. & M. 390.)

Some cases, though within the words of the statute, have been construed not to be within its meaning, as where an estate was devised by the husband to his wife in tail, with remainder over to a *stranger* in fee. (Cro. Eliz. 2; 1 Leon. 261.) So also where the husband purchased an estate, but the whole consideration was paid by the wife's sister upon condition that such estate should be settled to the use of the husband and wife in tail; it was held that the alienation of the wife after the death of the husband was valid, and not within the act. (*Watkins v. Lewis*, 1 Russ. & M. 378.) The stat. 11 Hen. 7, c. 20, being made for the protection of the interests of the issue, did not apply when the heir in tail himself joined with his mother either in a fine, or in the conveyance declaring the uses it was intended to effectuate. (*Curtis v. Price*, 12 Ves. 97. See the cases on the last-mentioned statute collected in *Roper on Husband and wife*, c. 12; *Cruise's Dig.* tit. xxxvi. c. 10; 1 *Prest. Conv.* 19—21, 146—149.)

Repeal of 11 Hen. 7, c. 20.

XVII. Provided always, and be it further enacted, that, except as to lands comprised in any settlement made before the passing of this act, the said act of the eleventh year of the reign of his Majesty King Henry the Seventh, shall be and the same is hereby repealed.

Except as to lands in settlements before this act the act 11 Hen. 7. c. 20, repealed.

Reversion in Crown, &c. not to be barred.

XVIII. Provided always, and be it further enacted, that the power of disposition herein-before contained shall not extend to tenants of estates tail, who, by an act passed in the thirty-fourth and

The power of disposition not to extend to certain tenants in tail.

thirty-fifth years of the reign of his Majesty King Henry the Eighth, intituled "An Act to imbar feigned Recovery of Lands wherein the King is in Reversion," or by any other act, are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct. (q)

Tenants in
tail of the gift
of the crown.

(q) By stat. 34 & 35 Hen. 8, c. 20, no feigned recovery by assent of parties against any tenant in tail of any lands given by the crown, whereof the reversion or remainder, at the time of such recovery had, shall be in the king, shall bind the heirs in tail, whether any voucher be had in such recovery or not; but after the death of such tenant in tail, the heirs in tail may enter and enjoy the lands according to the form of the gift; the recovery or any other thing done or suffered by or against such tenant in tail notwithstanding. In order to bring an estate tail with a reversion in fee to the crown within the protection of the act, it must be clearly a gift or provision of the king; for where a grant made by the crown, reserving the reversion on failure of the issue of the grantees, was made neither as a gift nor as a reward for services, but as an act of justice in execution of some secret trust or obligation binding the crown, it was held not to be within that act and that a recovery barred the reversion. (*Perkins d. Vouts v. Sewell*, 4 Burr. 2223; 8 C. 1 Bl. Rep. 654; see Co. Litt. 372 b, 373 a; Cruise's Dig. tit. 36, c. 10, s. 42—58; 1 Prest. Conv. 18, 19, 144—146, 221.) If the king, having made a gift in tail, reserving the reversion to himself, afterwards gave leave to the tenant in tail to suffer a common recovery, for the purpose of passing the reversion out of himself, in order to be reconveyed to him, which was done accordingly, the tenant in tail or his issue might afterwards bar such reversion by a common recovery, notwithstanding the statute, because the reversion having been once severed from the crown the privity of estate was gone, and the statute was intended only to restrain where the reversion continued in the crown without any alteration. (*Earl of Chesterfield's case*, Hardr. 409.) That mode of barring the crown was prevented by stat. 1 Ann. sess. 1, c. 7, which restrains the alienation of lands belonging to the crown except for a term not exceeding thirty-one years or three lives, or for a term determinable upon one, two, or three lives; but see stat. 34 Geo. 3, c. 75; 39 & 40 Geo. 3, cc. 86, 88; 47 Geo. 3, c. 24.

Where tenant in tail of the gift of the crown was disseised, and the disseisee levied a fine with proclamations and five years elapsed, it was held that the issue in tail was barred, although the fine of the tenant in tail himself would have been within the 34 & 35 Hen. 8, c. 20. (*Stratfield v. Dover*, Cro. Eliz. 595; but see 1 Sid. 166; 1 Roll. R. 171.)

A common recovery previously to the statute of Hen. 8,

did not bar the reversion or remainder in the crown, because it was not like common persons bound by the fictitious recompense on which the effect of a recovery was founded. (2 Roll. Abr. 293, 294; Hob. R. 339.) It was decided that, where tenant in tail male with the reversion in the crown, before the stat. 34 & 35 Hen. 8, c. 20, suffered a common recovery with single voucher, the recoveror gained a *base fee* determinable on failure of issue male of the donee, that such base fee was descendible and alienable, that the issue in tail were barred, and the ancient reversion remained in the crown, which might come into possession and take effect whenever there should be a failure of such issue. (Bro. Tail, 41; Cro. Car. 430; Plowd. 555; Dyer, 32 a; *Neal d. Duke of Athol v. Wilding*, 1 Wils. 275.) It was a question in a recent case whether a reversion in an estate in Ireland (to which the stat. 34 & 35 Hen. 8 does not extend,) after an estate tail, which had vested in the crown in consequence of the attainder of the reversioner, could be barred by a common recovery suffered by the issue in tail when in possession. The point was considered so doubtful by the House of Lords, that a purchaser who objected to the title on that ground was held not bound to accept it. (*Bloss v. Clanmorris*, 3 Bligh, 62.)

In several acts of parliament conferring estates on eminent individuals as a reward for public services, tenants in tail are restrained from aliening such estates, except for their own lives, as in the case of the Duke of Marlborough, by 5 Anne, cc. 3, 4, (see *Davis v. Duke of Marlborough*, 1 Swanst. 74,) and the Duke of Wellington. (See statutes 41 Geo. 3, c. 59, s. 6; 42 Geo. 3, c. 113, s. 6; 54 Geo. 3, c. 161, s. 28.)

By stat. 14 Eliz. c. 8, it is provided that recoveries against tenant by the curtesy, tenant in tail after possibility of issue extinct, or otherwise, for term of life, or estate determinable upon life, or with voucher over against any such particular tenant, shall be void against him in reversion or remainder. But this act shall not be prejudicial to any person who shall by good title recover lands by reason of a former right; and recoveries of lands by assent of him in reversion or remainder (so as such assent appear of record) shall be of like force against such person so assenting as before this act. A common recovery with double voucher, suffered by a bare tenant for life as vouchee, without feoffment or fine, was held to destroy a contingent remainder immediately expectant on the life estate, notwithstanding the statute 14 Eliz. c. 8. (*Doe d. Davies v. Getacre*, 5 Bing. N. C. 609.) A tenant in tail after possibility of issue extinct has no power of barring the estate tail or the remainders expectant thereon, but for all purposes of alienation is considered merely as tenant for life, (Co. Litt. 28 a; 11 Rep. 80;) although not impeachable for waste.

Thus where by a settlement before marriage the husband's estate was conveyed to trustees to the use of the husband for life, without impeachment of waste, remainder to trustees to

Tenants in
tail after pos-
sibility of
issue extinct.

preserve contingent remainders; remainder to the use of the wife for life for her *jointure* and in bar of dower; remainder to the first and other sons of the marriage in tail male; remainder to the first and other daughters in tail male; remainder to the heirs of the body of the husband and wife; remainder to the right heirs of the husband; the wife survived the husband, and had no issue; and it was held that she was tenant in tail after possibility of issue extinct, and that she was unimpeachable of waste, and entitled to the property of the timber when cut by her. (*Williams v. Williams*, 15 Ves. 419; S. C. 12 East, 209; 3 Madd. 519.) Where a testator, being seized in fee of the reversion of an estate, devised it to his wife during her natural life, and after her decease to the heirs of her body by the testator lawfully begotten or to be begotten, and for want of such issue with remainder over; the wife was held to be a tenant in tail after possibility, after the period from her husband's death when she might have had issue by him, though there never was any issue of the marriage. (*Platt v. Powles*, 2 Maule & S. 65.)

Power to enlarge Base Fees.

Power, after the 31st of Dec. 1833, to enlarge base fees; saving the rights of certain persons.

XIX. And be it further enacted, that after the thirty-first day of December one thousand eight hundred and thirty-three, in every case in which an estate tail in any lands shall have been barred and converted into a base fee, either before or on or after that day, the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee simple absolute: (r) saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

(r) The remainder of the corresponding section in the Irish stat. 4 & 5 Will. 4, c. 92, s. 16, runs thus—"including the King's

most excellent Majesty, his heirs and successors, as regards the title to^a his Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, where the title to the crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made: Provided always, that nothing in this act contained shall authorize any tenant in tail or other person to defeat or bar any estate or interest which may at the time of passing this act have been granted to any person or persons by his Majesty, or any of his predecessors, in any reversion or remainder which may have come to the crown by attainder or otherwise."

Disposition by Heirs Expectant restrained.

XX. Provided always, and be it further enacted, that nothing in this act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest(s) which he may have as issue inheritable to any estate tail therein. (z)

Issue inheritable not to bar expectancies.

(s) The words in the corresponding section of the Irish stat. 4 & 5 Will. 4, c. 92, s. 17, are "expectant interest or possibility."

(t) This clause of the act and the abolition of fines will have the effect of putting an end to some powers of alienation which previously might have been exercised by persons having only expectant interests, such as the eldest son of a tenant in tail or fee simple has during the life of his father. It may be useful to advert to the power of alienation possessed by persons having expectant or contingent interests, although all of them do not come within the operation of this act. A fine levied by a person who afterwards became heir was an estoppel. (1 Roll. Abr. 482, (S.) pl. 2; *Helps v. Hereford*, 2 B. & Ald. 242; *W. Jones*, 456; *Doe v. Martyn*, 2 Mann. & R. 485; 8 B. & C. 497; *Christmas v. Oliver*, 10 B. & C. 181.) But where a tenant in tail of an advowson and his son and heir joined in a grant of the next avoidance, and the tenant in tail died, it was adjudged that the grant was utterly void against the son and heir who joined in the grant, because he had nothing in the advowson neither in possession or right, nor in actual possibility at the time of the grant. (*Sir M. Wivel's* Alienation of expectancies.

case, Hob. 45; Perk. s. 65; 1 Anstr. 11; 3 Term Rep. 365. A fine would in some cases have barred the collateral heirs, the cognisor, though he was never seised of the entail, provided the right to such entail had descended upon him. For in a formedon in the descender the demandant had to mention every one to whom any right to the entail descended, by which means he became privy to all such persons. (8 Rej 88 b.) Thus if a father, tenant in tail, had three sons, and the eldest levied a fine in his father's lifetime, if he or any of his issue, inheritable to the entail, survived the father, the younger sons and their issue would have been barred by the fine, because by the death of the father a right to the entail descended to the elder brother and his issue, and so the younger brothers became privies to him. But where neither the cognisor nor any of his issue ever acquired a right to the entail, such fine would not have barred any of his collateral heirs, because in making out their title and pedigree to the person last seised of the entail, they need not have mentioned the person who levied the fine or any of his descendants, and consequently were not privies to them. So where an eldest son levied a fine of an estate tail, which was then vested in his mother, and then died in her lifetime, so that the estate tail never descended on him, it was held that such fine did not bar the second brother, because the estate tail never having descended to the elder brother, the younger was not privy to him. (*Bradstock v. Scovel*, Cro. Car. 434.)

Persons empowered to dispose of lands in Ireland, not having a vested estate.

By stat. 4 & 5 Will. 4, c. 92, s. 22, for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance in Ireland, it is enacted, "that from and after the 31st day of October, 1834, it shall be lawful for any person, either before or after he shall become entitled in any manner, except as expectant heir of a living person, or as expectant heir of the body of a living person, to an estate in lands, not being a vested estate, and whether he be or be not ascertained as the person or one of the persons in whom the same may become vested, to dispose of such lands for the whole or any part of such estate therein by any assurance, whether deed, will, or any other instrument by which he could have made such disposition if such estate were a vested estate in possession: Provided nevertheless that no such disposition shall be valid or have any effect where the person making the same shall not at the time of the disposition have become entitled to such estate, unless the deed, will, or other instrument by virtue of which he may become entitled be existing and in operation at the time of the disposition."

Possibilities.

A mere possibility could be only bound or extinguished at law by estoppel, by a fine, or recovery (*Weale v. Lower*, Pollex. 54), or in equity by contract. (*Buckley v. Newland*, 2 P. Wms. 182; *Hobson v. Trevor*, Id. 191; see *Lyde v. Mynn*, 1 M. & Keen, 693; 1 Madd. Ch. 437; 3 Mer. 671.) But when a possibility is coupled with an interest, as where

the person is fixed and ascertained, it may not only be bound by estoppel or contract, but may be released (*Jewson v. Moulson*, 2 Atk. 417), pass under the bargain and sale of commissioners of bankrupt, or be devised, though it cannot be granted or transferred by the ordinary rules of the common law. (*Lampet's case*, 10 Rep. 46.) An agreement, of which the subject is an expectancy contingent upon the will of a living person, is not illegal, but will be enforced in equity. (*Lyde v. Mynn*, 1 My. & Keen, 683. See *Pope v. Whitcombe*, 3 Russ. 124.) A specific performance was decreed of an agreement between two sons to share equally whatever property they might derive from their father either in his lifetime or at his decease. (*Wethered v. Wethered*, 2 Sim. 183; see *Harwood v. Tooke*, 2 Sim. 192; *Alexander v. Duke of Wellington*, 2 Russ. & M. 56; *Carlton v. Leighton*, 3 Mer. 667.) If an heir apparent levied a fine of lands, and survived his ancestor, he was bound by estoppel after the descent to him. (*Edwards v. Rogers*, Sir W. Jones, 456; *Wright v. Wright*, 1 Ves. sen. 412.) But where, in pursuance of an agreement made before marriage, certain estates belonging to the wife, and other lands belonging to her father, in which she had no interest, were conveyed by lease and release according to the articles, and then a fine was levied by the husband and wife to the uses of the settlement, as well of the lands to which she was then entitled, as of other lands belonging to her father, one moiety of such lands having descended to her on his death as one of his co-heiresses, it was held that such moiety became subject to and bound by the uses of the settlement, the fine having operated as an estoppel. (*Helps v. Hereford*, 2 Barn. & Ald. 242.) A fine by a contingent remainder-man did not operate by estoppel only, but it had an ulterior operation when the contingency happened; that the estate which then became vested fed the estoppel, so that the fine operated upon that estate as if it had been vested in the cognisors at the time the fine was levied. (*Rawlin's case*, 4 Rep. 62; *Weale v. Lower*, Poll. 54; *Trevivan v. Lawrence*, 6 Mod. 258; *Ld. Raym.* 1061; *Vick v. Edwards*, 3 P. Wms. 372; *Doe d. Christmas v. Oliver*, 10 Barn. & Cress. 181; *Doe v. Howell*, Id. 191; *Doe v. Martyn*, 8 B. & C. 527; *Davies v. Bush*, 1 M'Clel. & Y. 58; see *Fearne*, 365.)

A fine by a contingent remainder-man passed nothing, but left the right as it found it, and therefore was no bar when the contingency happened, in the mouth of a stranger to the fine against a claim in the name of such remainder-man; as the fine operated by estoppel only, which was available only by parties and privies. (*Doe d. Brune v. Martyn*, 8 B. & C. 527.)

A contingent interest in terms of years may be assigned in equity for valuable consideration, or for love and affection between parent and child. (1 Ves. sen. 411; *Wind v. Jekyl*, 1 P. Wms. 672.)

The doctrine of estoppel is a curious and important head of

the law, and well deserving attention. It would exceed the limits of these annotations to discuss it at large, but it may be useful to state some of its principles. An estoppel is when one is concluded and forbidden in law to speak against his own act or deed, even though it be to say the truth. (Terms of the Law, 157; Litt. 667; Co. Litt. 352 a.) There are three kinds of estoppels, by matter of record, by deed, whether an indenture or a deed poll (*Bonner v. Wilkinson*, 5 B. & Ald. 682; 1 D. & R. 328), with this difference, that in the case of a deed poll only the party making the deed is estopped, while by a deed indented both parties are concluded (Co. Litt. 47 b; *Lewis v. Willis*, 1 Wils. 314; Litt. s. 693); and by matter *in pais*, as by livery, by entry, by acceptance of rent, by partition, &c. (Co. Litt. 352.)

Estoppel by deed.

It was held by *Leach*, Master of the Rolls, that where by deed indented a man represents himself as the owner of an estate, and affects to convey it for valuable consideration, having at the time no possession or interest in the estate, and where nothing therefore can pass, whatever be the nature of the conveyance, there, if by any means he afterwards acquire an interest in the estate, he is estopped in respect of the solemnity of the instrument from saying, as against the other party to the indenture, contrary to his own averment in it, that he had not such interest at the time of its execution. A conveyance by lease and release will operate as an estoppel; and where the releasee can have the benefit of the conveyance at law, a court of equity will not interfere in his behalf. (*Bensley v. Burdon*, 2 Sim. & Stu. 519, afterwards affirmed by the Lord Chancellor; see 2 B. & Ad. 282.) But where A., having an equitable fee in certain lands, mortgaged the same to B. by lease and release, and the latter recited that A. was *legally or equitably* entitled to the premises conveyed; and the releasee covenanted that he was lawfully and equitably seised in his demesne of and in and otherwise well entitled to the same, and the legal estate was subsequently conveyed to A., and he afterwards, for a valuable consideration, conveyed the same to C.: upon an ejectment brought by B. against C. it was held, first, that there being in the release no certain and precise averment of any seisin in A., but only a recital and covenant that he was legally or equitably entitled, C. was not thereby estopped from setting up the legal estate acquired by him after the execution of the release, and that the release did not operate as an estoppel by virtue of the words granted, bargained, sold, aliened, remised, released, &c., because the release passed nothing but what the releasor had at the time, and A. had not the legal estate in the premises. (*Right d. Jefferys v. Bucknell*, 2 B. & Ad. 278.) In this case there was a want of that certainty which is requisite to create an estoppel, the recital being in the alternative, that the "mortgagor was lawfully or equitably entitled," and the covenant for title was to the same effect. The party is not estopped by a deed, upon

the face of which the truth appears; for if the deed alleges the truth, it is obvious that the truth cannot be alleged against the deed, and the case of an estoppel cannot arise. While A. was in possession, B. and his eldest son, by deed truly reciting the facts, released their interest to trustees; it was admitted, that this being a release of a possibility to a party not privy in estate, and the whole truth appearing by the deed, no legal interest passed either by way of conveyance of interest, or by way of estoppel. (*Doe d. Lumley v. Earl of Scarborough*, 3 Ad. & Ell. 2; 4 Nev. & M. 730; see *Doe d. Barber v. Lawrence*, 4 Taunt. 23.) The recital of a particular fact in a deed will enop the party making the statement. (1 Show. 57; *Shelley v. Wright, Willes*, 9; *Lainson v. Tremere*, 1 Ad. & Ell. 792; 3 Nev. & M. 603; *Bowman v. Taylor*, 2 Ad. & Ell. 278; 4 Nev. & M. 264; *Hill v. Manchester and Salford Waterworks Company*, 2 B. & Ad. 544.) The execution by the lessee of the counterpart of a lease granted in exercise of a power given by a will recited in the lease, was held an admission of the execution of such will. (*Bringle v. Goodson*, 5 Bing. N. C. 738; 8 Scott, 71.) A party taking under a conveyance is not estopped by recitals in a previous deed, on which the title conveyed is founded, when the suit relates to other lands than those comprised in such conveyance. (*Doe d. Shelton v. Shelton*, 4 Nev. & M. 857; 3 Ad. & Ell. 265.)

The effect of an estoppel is to prevent the party who has executed it from impugning the general effect of the deed, or any particular statement or clause it contains. (Cwmp. 600; Ca. Litt. 47 b; *Doe v. Ford*, 3 Ad. & Ell. 649.) The receipt for the consideration money in the body of the deed is binding upon the parties at law (*Rountree v. Jacob*, 2 Taunt. 141;) and cannot be contradicted by parol evidence (*Baker v. Dewey*, 1 B. & C. 704); but equity, on proof that the money was not paid, will grant relief. (*Ryle v. Haggie*, 1 Jac. & W. 234.) But the operation of the words of the release and receipt may be restrained by the recitals in a deed, showing that the money has not been paid. (*Lampon v. Corke*, 5 B. & Ald. 606; 1 D. & R. 211; see *Alner v. George*, 1 Camp. 392; *Legh v. Legh*, 1 Bos. & P. 447; *Hickey v. Burt*, 7 Taunt. 48; *Jones v. Herbert*, 7 Taunt. 421; *Payne v. Rogers*, Dougl. 407.) But the receipt for the consideration money indorsed on a deed being no part of it, is not an estoppel, but only evidence open to contradiction. (*Lampon v. Corke*, 5 B. Ald. 606; *Graves v. Key*, 3 B. & Ad. 313.) The rule which requires a man to be bound by his own deliberate representations of matters of fact, may be overbalanced by weightier considerations. Thus if a trustee, deriving his authority from a public act of parliament, grants by a deed unauthorized by the act, the grantor will not be estopped from insisting against the other party to the deed that he had no such power. (*Fairtitle d. Milton v. Gilbert*, 2 T. R. 169; see *Doe d. Baggely v. Hares*, 4 B. & Ad. 435.) So a party to a deed is not estopped from

Effect of an estoppel

Exceptions to the rule.

pleading its illegality (*Collins v. Blantern*, 2 Wils. 347; *Paxton v. Popham*, 9 East, 408); nor from showing that the consideration was immoral, or contrary to an act of parliament or public policy. (*Prole v. Wiggins*, 3 Bing. N. C. 230; 3 Scott, 601.) So a party is not estopped from showing that a deed is void under the Mortmain Act, 9 Geo. 2, c. 36. (*Doe d. Preece v. Howells*, 2 Ad. & Ell. 744.) But a man cannot avoid his own deed by an allegation of his own fraud, as that the deed was executed for the purpose of giving a colourable qualification to kill game. (*Doe v. Roberts*, 2 B. & Ald. 367; see further on this subject Com. Dig. Estoppel; 1 Wms. Saund. 325, n. (4); 2 Smith's Leading Cases, 444; see also the cases *Doe d. Leming v. Skirrow*, 7 Ad. & Ell. 157; 2 Nev. & P. 123; *Gaunt v. Wainman*, 3 Scott, 413; *Whitton v. Peacock*, 2 Bing. N. C. 411; 3 M. & Keen, 792; *Bringlee v. Goodson*, 4 Bing. N. C. 726; 6 Scott, 502.)

Copyholds
not bound by
estoppel.

In order to pass a copyhold estate by surrender, the estate must pass into the hands of the lord, through which it must be taken. A fine differed from the case of a surrender inasmuch as it was good against the heir by estoppel, although it passed no estate; but if a surrender be not valid, there will be no estoppel, and no estate can pass into the hands of the lord. (*Taylor v. Philips*, 1 Ves. sen. 230.) It was held that a surrender of a copyhold estate made by the heir apparent in the lifetime of the ancestor, whom he survived, did not operate by estoppel so as to prevent the heir at law of the surrenderor from recovering the possession. (*Goodtitle v. Morse*, 3 Term R. 365.) And a court of equity afterwards refused to compel the heir at law to surrender to the purchaser, on the ground that the original contract to convey made by one not then entitled was a personal equity attaching on the conscience of the party, and not descending with the land. (*Morse v. Faulkner and others*, 1 Anstr. 11; 8 C. 3 Swanst. 429.) On the same principle devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; and such a surrender will not operate by estoppel against the parties or their heirs. (*Doe d. Blacksell v. Tomkine*, 11 East, 185.) And where a copyhold was surrendered to the use of the husband and wife for their natural lives and the life of the longer liver of them, and after the death of the survivor of them to the right heirs of the survivor for ever, it was held that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor, which neither passed nor was bound by their joint surrender to a purchaser for a valuable consideration. (*Doe v. Wilson*, 4 Barn. & Ald. 303.) In the case last cited Lord Tenterden, C. J. observed, that the surrender to the purchaser for a valuable consideration must receive the utmost effect of which it was legally capable, and be construed to pass all that the surrenderors could lawfully convey. Now the quantum of estate which they might

lawfully convey must be commensurate with the quantum of estate that was actually vested in them at the time of the surrender, which was an estate held in entirety for their joint lives and the life of the survivor, and that a surrender of a copyhold could not operate by estoppel. (Id. 312, 313; see *Doe d. Baverstock v. Rolfe*, 3 Nev. & P. 648.)

It has been seen that by the 15th section of this act, (*ante*, p. 298,) every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, has power to alien; and as this clause is applied to copyholds by the 50th section of this act, (*see post*) it should seem that a contingent tenant in tail of copyholds may now dispose of such interest by the modes prescribed by this act.

Before the amendment of the laws of wills, contingent and executory estates and possibilities accompanied with an interest were devisable. (*Selwin v. Selwin*, Burr. 1131; *Moore v. Hawkins*, 2 Eden's C. C. 342; *Roe v. Griffiths*, 1 Bl. Rep. 605; *Roe v. Jones*, 1 Hen. Bl. 30; *Jones v. Roe*, 3 East 88; 17 Ves. 182; *Seaven v. Blunt*, 7 Ves. 300.) But such an interest was not devisable where the person who is to take is not in any degree ascertainable before the contingency happens; as where there was "a devise to two equally, or to the survivor of them, and to be disposed of by her, the survivor, as she might by will devise;" the will of one of such devisees made during their joint lives, although she survived, was held inoperative. (*Doe d. Calkin and others v. Tomkinson*, 2 Maule & Sel. 164.) By stat. 7 Will. 4 and 1 Vict. c. 26, s. 3, contingent interests are devisable, whether the testator may or may not be ascertained as the person, or one of the persons, in whom the same respectively may become vested.

Possibilities in personal estate may be disposed of by will as well as assigned in equity. (*Fearne*, 439; *Pollexf.* 44; 2 *Freem.* 250; 9 *Mod.* 101; 2 *P. Wms.* 608; 1 *P. Wms.* 572; 3 *P. Wms.* 132. See *Shelford on Wills*, pp. 153—155.)

Contingent
interests de-
visable.

Dispositions for limited Purposes.

XXI. Provided always, and be it further enacted, that if a tenant in tail of lands shall make a disposition of the same under this act, by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by this act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied

Extent of the
estate created
by a tenant
in tail by way
of mortgage,
or for any
other limited
purpose.

in the deed by which the disposition may be effected: Provided always, that if the estate created by such disposition shall be only an estate *pour autre vie*, or for years absolute or determinable, or if, by a disposition under this act by a tenant in tail of lands, an interest, charge, lien or incumbrance shall be created without a term of years absolute or determinable, or any greater estate, for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected. (u)

(u) By this section of the act, if a tenant in tail makes a mortgage in fee with a proviso for redemption in the usual form, he will thenceforth be entitled to the equity of redemption discharged from the entail; but if he creates an estate *pour autre vie*, or for years only, or an "interest, charge or incumbrance," without a term of years, by way of mortgage, the entail will be affected only to the extent of the charge created, although there be an express declaration of intention that the deed shall operate as a complete bar of the entail. Assuming, what is not clear, that a conveyance by a tenant in tail to a trustee to the use of a mortgagee for a term of years, with remainder to such uses as the tenant in tail should appoint, or to the use of himself in fee, would not extinguish the entail altogether, it will be necessary, where the object is to make a mortgage for years, or to create a charge, and to bar the entail in the equity of redemption, to attain the latter object by a distinct deed, either before or after the creation of the mortgage or charge. Assuming also, what is not clear, that where a mortgage in fee is made, with a proviso that on payment of the money the estate shall be reconveyed to the former uses, either by reference or by express limitation to the same uses, that the entail would not be revived, it will be necessary to have a distinct deed for preserving the entail, as to the equity of redemption; it may however be contended that the object of this section is not to apply to express limitations, but merely to prevent a simple declaration that the entail shall or shall not be barred from having any operation; (see 9 Jarm. Conv. 404, 405;) and therefore that, by one deed, either of the last-mentioned objects may be accomplished. In mortgages in fee, whether of freeholds or copyholds, when it is intended that the equity of redemption shall be discharged

from the entail without any further assurance, it will be proper to frame the proviso of redemption not so as to make the estate of the mortgagee void on payment of the money, but to direct that he shall re-convey it (which is the usual form) to the uses intended; for if the condition in the former case should be performed, it might be contended that the tenant in tail became seized of his former estate tail. The charge of a further sum by way of mortgage is, under ordinary circumstances, usually effected by a covenant, but if a tenant in tail, having mortgaged for a term of years only, wishes to create a further charge, he ought to re-demise and confirm.

The words interest, charge, lien, or incumbrance, unless controlled by the 40th section of the act, (see post, p. 329,) would seem to include an equitable mortgage. The deposit of title deeds is evidence of an agreement executed for a mortgage, and an equitable title to a mortgage is, in the Court of Chancery, as good as a legal title in a court of law. (*Ex parte Wright*, 19 Ves. 258.) It has long been settled law, that a mere deposit of deeds, without a single word passing, operates as an equitable mortgage, if no other purpose be shown; (*Ex parte Kensington*, 2 Ves. & B. 83; *Ex parte Langton*, 17 Ves. 230; a rule which has often been reprobated, and as it seems is not to be extended. (*Ex parte Wetherell*, 11 Ves. 398; *Ex parte Haigh*, 11 Ves. 403; *Norris v. Wilkinson*, 12 Ves. 192.) So the deposit of the copy of court roll, by which a copyhold estate is held, gives a lien thereon in the nature of a mortgage. (*Ex parte Warner*, 19 Ves. 202.) A written agreement accompanying the deposit must *prima facie* determine the purpose for which it was made; (*Ex parte Coombe*, 17 Ves. 371; *Ex parte Mountfort*, 14 Ves. 607;) though a deposit originally for a particular purpose may be enlarged by a subsequent parol agreement. (*Ex parte Kensington*, 2 Ves. & B. 84.) Where the object of the deposit is not evidenced by writing, the court must decide upon parol evidence with what intent the deposit was made, although in truth it is in the very teeth of the statute of frauds. (29 Car. 2, c. 3; *Ex parte Whitbread*, 19 Ves. 211; *Ex parte Haigh*, 17 Ves. 402; *Norris v. Wilkinson*, 12 Ves. 197. See 2 Hov. Suppl. to Ves. jun. p. 148.) A question has been raised whether, independently of fraud, an equitable mortgagee is entitled to priority over a subsequent judgment creditor without notice, who has obtained possession of the land under an *elegit*. (*Whitworth v. Gaugain*, 5 Jur. 523. On equitable mortgages, see Jarm. Conv. by Sweet, 109 *et. seq.*; Coots on Mortgages, ch. viii.)

DEFINITION OF THE PROTECTOR.

XXII. And be it further enacted, that if at the time when there shall be a tenant in tail of lands

The owner of the first ex-

isting estate
under a set-
tlement, prior
to the estate
tail under the
same settle-
ment, to be
the protector
of the set-
tlement.

under a settlement, there shall be subsisting in the same lands or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made, (the first of such prior estates, if more than one, being for all the purposes of this act deemed the prior estate,) shall be the protector of the settlement so far as regards the lands in which such prior estate shall be subsisting, and shall for all the purposes of this act be deemed the owner of such prior estate, although the same may have been charged or incumbered either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances of such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement within the meaning of this clause; and that an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause. (x)

(z) In cases of lunacy the Lord Chancellor is protector, (see *post*, ss. 33, 48,) but he is not authorised, when the tenant in tail in possession is in a state of hopeless lunacy, to consent to the first tenant in tail in remainder barring the subsequent limitations, even for the purpose of preventing the settled estate from going over to collateral relations. (*In re Blewitt*, 3 M. & Keen, 250; *In re Wood*, 3 M. & Cr. 266. See note to section 48, *post*, pp. 334—337.)

Protector as to undivided Shares.

XXIII. Provided always, and be it further enacted, that where two or more persons shall be owners, under a settlement, within the meaning of this act, of a prior estate, the sole owner of which estate, if there had been only one, would in respect thereof have been the protector of such settlement, each of such persons in respect of such undivided share as he could dispose of, shall for all the purposes of this act be deemed the owner of a prior estate, and shall, in exclusion of the other or others of them, be the sole protector of such settlement to the extent of such undivided share. (g)

Each of two or more owners of a prior estate to be the sole protector as to his share.

(g) See *Church v. Edwards*, 2 Br. C. C. 180; *Oakley v. Smith*, Amb. 90; 1 Eden, 261; 3 Prast. Conv. 90, et seq.

Protector in case of married Women.

XXIV. Provided always, and be it further enacted, that where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is not thereby settled, or agreed or directed to be settled, to her separate use, she and her husband together shall in respect of such estate be the protector of such settlement, and shall be deemed one owner; but if such prior estate shall by such settlement have been settled, or agreed or directed to be settled to her separate use, then and in such case she alone shall in respect of such estate be the protector of such settlement.

Where a married woman alone shall be the protector, and where she and her husband together shall be protector.

Protector as to Estates restored or confirmed.

XXV. Provided always, and be it further enacted, that, except in the case of a lease hereinafter provided for, where an estate shall be limited by a settlement by way of confirmation, or where the settlement shall merely have the effect of restoring an estate, in either of those cases such estate shall

As to estates confirmed or restored by settlement.

for the purposes of this act, so far as regards the protector of the settlement, be deemed an estate subsisting under such settlement.

Lessees not to be Protector.

As to leases
at rent cre-
ated by
settlement.

XXVI. Provided always, and be it further enacted, that where a lease at a rent shall be created or confirmed by a settlement, the person in whose favour such lease shall be created or confirmed, shall not in respect thereof be the protector of such settlement.

Doweresses, &c. not to be Protector.

No tenant in
dower, heir,
executor, &c.
to be pro-
tector, except
in the case of
a bare trust-
tee.

XXVII. Provided always, and be it further enacted, that no woman in respect of her dower, (s) and (except in the case hereinafter provided for of a bare trustee under a settlement made on or before the thirty-first day of December, one thousand eight hundred and thirty-three,) no bare trustee, heir, executor, administrator or assign, in respect to any estate taken by him as such bare trustee, heir, executor, administrator or assign, shall be the protector of a settlement.

(s) It was not thought advisable to require the concurrence of the tenant in dower, for it seldom if ever happens that dower is set out by metes and bounds; and if such an estate does occur, her concurrence would have only a partial operation as the estate is confined to a part of the lands entailed. (1 Real Prop. Rep. pp. 32, 33.)

Who to be Protector where excluded by the two last clauses.

Who shall be
the protector
where the
owner of the
prior estate
shall, by the
two last
clauses, be
excluded.

XXVIII. Provided always, and be it further enacted, that where under any settlement there shall be more than one estate prior to an estate tail, and the person who shall be the owner within the meaning of this act of any such prior estate, in respect of which but for the two last preceding clauses, or either of them, he would have been the protector of the settlement, shall by virtue of such clauses, or either of them, be excluded from being

the protector, then and in such case the person (if any) who if such estate did not exist would be the protector of the settlement, shall be such protector.

Tenant to the præcipe to be Protector, when.

XXIX. Provided always, and be it further enacted, that where already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, an estate under a settlement shall have been disposed of either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if this act had not been passed, have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of the lands entailed by such settlement, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement. (a)

Where, in the disposition of an estate before the 31st December, 1833, the person to make the tenant to the writ of entry in a recovery shall be the protector.

(a) This and the following section of the act, will render it necessary, where it is intended to bar an entail created on or before the 31st December, 1833, to ascertain in whom the immediate freehold of the lands is vested, in the same way as was required for determining who was the proper person for making a tenant to the præcipe in a recovery. (See ante, pp. 294.) This section must be attentively considered in connection with the 27th, 30th, and 31st sections. In *Corrall v. Cattell*, 4 Mee. & W. 734; (and see *Cattell v. Corrall*, 3 Y. & Coll. 413,) a testator by his will dated the 24th April, 1817, devised estates to his wife for life, (subject to the annuity of £2 to his daughter), with remainder to his second son in tail, with remainder to the testator's right heirs. The testator died in 1817, leaving his wife surviving him, and lived until 1832. By a deed dated the 19th August, 1817, and made between the tenant in tail of the one part, and two trustees of the other part, in consideration of 10s. and other good considerations, the tenant in tail granted, released and confirmed to the said trustees, their heirs and assigns, the remainder or reversion of the grantor in the premises expectant on the decease of his mother, to hold unto the said trustees during the life of the grantor, in trust of their own proper authority, and without the further concurrence of the grantor, to let and demise the premises and to receive the rents and profits, and thereout in the first place to discharge the annuity of £2, given by the will, and to pay the expenses of all repairs, and to reimburse them-

Question as to protectorship.

selves all costs, and lastly to pay the surplus to the grant his executors, administrators and assigns. And the deed contained a proviso that nothing therein contained should operate beyond the plaintiff's life interest in the property. The tenant in tail having sold the estate a question was raised whether could make a good title to the premises, without the sanction and concurrence of the surviving trustee under the above deed. It was argued that the tenant in tail having parted with his estate altogether, or at least parted with the legal interest, was not in a condition to have suffered a recovery to bar the reversion upon the estate tail to his elder brother, who was alive and that the stat. 3 & 4 Will. 4, c. 74, would not help him out of the difficulty, either because the surviving trustee was protector of the settlement within the meaning of that act, and would not join, or because there was no protector of the settlement, and therefore the act did not apply. It was unnecessary however to decide these important questions. (See s. 29, ante

Where in the case of the disposition of a reversion on or before the 31st of December, 1833, the person to make the tenant to the writ of entry in a recovery shall be the protector.

XXX. Provided always and be it further enacted, that where any person having either already or on or before the thirty-first day of December one thousand eight hundred and thirty-three either for valuable consideration or not, disposed of, either absolutely or otherwise, a remainder or reversion in fee in any lands, or created any estate out of such remainder or reversion, would, under this act, if this clause had not been inserted, have been the protector of the settlement by which the lands were entailed in which such remainder or reversion may be subsisting, and thereby be enabled to concur in the barring of such remainder or reversion, which he could not have done if he had not become such protector, then and in every such case the person who, if this act had not been passed, would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of such lands, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

Bare Trustee to be Protector, when.

XXXI. Provided always, and be it further enacted, that where, under any settlement of lands made before the passing of this act, the person who, if this act had not been passed, would have been the proper person to make the tenant to the writ of entry or other writ for suffering a common recovery of such lands for the purpose of barring any estate tail or other estate under such settlement, shall be a bare trustee, such trustee shall, during the continuance of the estate conferring on him the right to make the tenant to such writ of entry or other writ, be the protector of such settlement. (b)

Where a bare trustee under a settlement made before the passing of this act shall be the protector.

(b) Under this section a trustee having the first immediate estate of freehold, will be protector of a settlement, made before the passing of this act. (28 Aug. 1833.) Thus under a settlement containing a limitation to A. for ninety-nine years, if he should so long live, with remainder to trustees during the life of A. upon trust by the usual means to preserve contingent remainders, with remainder to the first and other sons of A. in tail; the trustees would be protector of the settlement during the life of A., and their concurrence would be necessary for enabling the first tenant in tail to make an effectual disposition. (See *Smith v. Dummer v. Packhurst*, 3 Atk. 135; 2 Str. 1105; Andr. 315.)

Power to appoint Protector.

XXXII. Provided always, and be it further enacted, that it shall be lawful for any settlor entailing lands to appoint, by the settlement by which the lands shall be entailed, any number of persons in esse, not exceeding three, and not being aliens, to be protector of the settlement in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector, and by means of a power to be inserted in such settlement to perpetuate, during the whole or any part of such

Power to any settlor to appoint the protector.

period, the protectorship of the settlement in any one person or number of persons in esse, and no being an alien or aliens, whom the donee of the power shall think proper by deed to appoint protector of the settlement in the place of any one person or number of persons who shall die or shall by deed relinquish his or their office of protector: and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the protector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: Provided nevertheless, that by virtue or means of any such appointment, the number of the persons to compose the protector shall never exceed three: provided further nevertheless, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof: provided further nevertheless, that the person who but for this clause would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector, if the other persons constituting the protector shall have ceased to be so by death or relinquishment of the office by deed, and no other person shall have been appointed in their place.

Protector of Lunatics, &c.

In cases of lunacy, the Lord Chancellor or Lord Keeper, or Lords Commissioners, or other persons entrusted with lunatics, or in cases of treason or

XXXIII. Provided always, and be it further enacted, that if any person, protector of a settlement, shall be lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, (c) then the Lord High Chancellor of Great Britain, or the Lord Keeper or the Lords Commissioners for the custody of the great seal of Great Britain for the time being, or other

the person or persons for the time being entrusted by the King's sign manual with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, shall be the protector of such settlement in lieu of the person who shall be such lunatic or idiot, or of unsound mind as aforesaid; or if any person, protector of a settlement, shall be convicted of treason or felony, or if any person not being the owner of a prior estate under a settlement, shall be protector of such settlement, and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then his Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid; or if any settlor entailing the lands shall, in the settlement by which the lands shall be entailed, declare that the person who as owner of a prior estate under such settlement would be entitled to be protector of the settlement shall not be such protector, and shall not appoint any person to be protector in his stead, then the said Court of Chancery shall, as to the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate; or if in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands.

felony, &c.,
the Court of
Chancery to
be the pro-
tector.

(c) Where the party has not been found a lunatic, &c. it will probably be referred to a master in Chancery to ascertain that fact, and whether the party, if of sound mind, would be protector of the settlement. (See post, note to section 48.)

POWERS OF THE PROTECTOR.

His consent required.

Where there is a protector, his consent requisite to enable an actual tenant in tail to create a larger estate than a base fee.

XXXIV. Provided always, and be it further enacted, that if at the time when any person, actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is hereinbefore authorized to dispose of the same; (d) but such actual tenant in tail may, without such consent, make a disposition under this act of the lands entailed, which shall be good against all persons who, by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same, shall claim the lands entailed.

Advantage of consent to a conveyance.

(d) The advantage attending the new mode of making the first beneficial owner merely a *consenting* and not a *conveying* party, will be, that he will be able to give his concurrence to the alienation by the remainder-man in tail without affecting the powers or contingent rights or interests of the tenant for life, anterior to the estate tail to be barred, and without letting in the incumbrances of the remainder-man, which without due caution were the consequences of the old rule. (See 1 *Real Prop. Rep.* 33.) Several ingenious contrivances had been adopted by conveyancers for avoiding those inconveniences, respecting which further information will be found in Co. Litt. 203 b, n. by Butl.; 1 Prest. Conv. 107—118; 2 Sand. on Uses, 207, 4 ed.; *Palham's case*, 1 Rep. 14 b; *Smith d. Richards v. Clifford*, 1 T. R. 738; *Doe v. Lord Mulgrave*, 5 T. R. 320; *Earl Jersey v. Deane*, 5 B. & Ald. 575; *Roper v. Halifax*, 8 Taunt. 845; *Doe d. Lumley v. Earl of Scarborough*, 8 Ad. & Ell. 43.

According to the strict rules of the common law, the over-reaching power of a fine "*Sur convauance de droit come see*,"

&c." in divesting estates, and in extinguishing rights, powers, &c. was so inflexible, that its operation could not be controlled even by the declared intention of the parties. It had however been recently decided that a fine might be prevented from operating beyond the particular purposes intended, provided such intention of the parties clearly appeared. (*Earl Jersey v. Deane*, 5 B. & Ald. 569; *Tyrell v. Marsh*, 3 Bing. 31; *S. C.* 10 B. Moore, 305. See Sugd. on Powers, 65—73, 5th ed.)



Protector must consent to Enlargement of base Fee.

XXXV. Provided always, and be it further enacted, that where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail, if the same had not been barred, to exercise, as to the lands in respect of which there shall be such protector, the power of disposition hereinbefore contained.

Where a base fee and a protector, his consent requisite to the exercising of a power of disposition.

Protector not to be controlled.

XXXVI. And be it further enacted, that any device, shift or contrivance, by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void; and that the protector of a settlement shall not be deemed to be a trustee in respect of his power of consent; and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust.

The protector to be subject to no control in the exercise of his power of consenting.

Exclusion of Equity as to Protector.

XXXVII. Provided always, and be it further enacted, that the rules of equity in relation to

Certain rules of equity not to apply be-

tween the protector and a tenant in tail under the same.

dealings and transactions between the donee of power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and a tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this act. (c)

The rule in equity referred to by last section.

(c) Where a party has a power of appointing an estate, whether real or personal, amongst several objects, and exercises such power upon condition that the party in whose favour the appointment is made shall confer on the appointor, or a stranger, some benefit at the expense of the objects of the power, such execution is fraudulent, and will be set aside in equity. (See *Paullet v. Paullet*, 1 Wils. 224; *Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 71; *Lane v. Page*, Amb. 233; *Boyle v. Bishop of Peterborough*, 1 Ves. jun. 299; *Tucker v. Sanger*, M'Clel. 430.) Thus, where a person having a power of jointuring executed it in favour of his wife, but it was agreed between the parties that the wife should receive only part of the jointure for her own benefit, and that the residue should be applied for the use of the husband, the execution of the power was set aside so far as it was in favour of the husband himself, on the ground of its being a fraud on the power and those creating it. (*Lane v. Page*, Amb. 233; *Aleyn v. Belcher*, 1 Eden, 132.) So, if a parent under a power of appointing the estate unto any of his children, exclusively of the others, appoint to one, upon a previous bargain with such child that he should pay a consideration for it, equity will set aside the appointment altogether. (*M'Queen v. Farquhar*, 11 Ves. 467; *Palmer v. Wheeler*, 2 Ball & Beatty, 18; *Rhodes v. Cook*, 2 Sim. & Stu. 488; *Farmer v. Martin*, 2 Sim. 502; *Green v. Pulford*, 2 Beav. 70.) So if the donee of the power appoints the fund to one of the objects of the power, upon an understanding that the latter is to lend the fund to the former, although on good security, the appointment is bad. (*Arnold v. Hardwick*, 7 Sim. 343. See Sugd. on Powers, 415—426, 5th ed.; 2 Chance on Pow. 441—446.) But the principle of those cases has not been extended to the case of a tenant in tail in remainder joining with his father, a tenant for life, in suffering a recovery and resettling the estate, although an immediate benefit has been conferred on the son as a consideration for his barring the entail. (*Tweddell v. Tweddell*, Turn. & Russ. 1; *Davis v. Uphill*, 1 Swanst. 129.)

CONFIRMATION OF VOIDABLE ESTATES CREATED BY
TENANT IN TAIL.

XXXVIII. Provided always, and be it further enacted, that when a tenant in tail of lands under a settlement shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards under this act, by any assurance other than a lease not requiring enrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be capable under this act of confirming the same without such consent: (f) Provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him. (g)

A voidable estate by a tenant in tail, in favour of a purchaser, confirmed by a subsequent disposition of such tenant in tail under this act, but not against a purchaser without notice.

(f) The proviso in the corresponding clause in the Irish stat. 4 & 5 Will. 4, c. 92, s. 36, is as follows: "Provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice

of the voidable estate, and if the deed or instrument creating such voidable estate shall not have been registered previous to such disposition, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him."

Prior acts of
tenant in tail,
how confirmed.

(g) If a tenant in tail who had executed any settlement, lease or mortgage, or created any charge or incumbrance by statute, judgment, or otherwise, affecting the entailed land, afterwards suffered a recovery, its effect was to confirm such prior acts, and to make the lands chargeable with them, although before they were defeasible by the issue, for whatever act bound the tenant in tail himself, was binding on the recoverers, or the persons to whose use the recovery was suffered; who were estopped from alleging that the person against whom they recovered had but an estate tail. (*Capel's case*, 1 Rep. 60; 5 S. C. Poph. 5, 6; *Beck d. Hawkins v. Welsh*, 1 Wils. 277; *Tourle v. Rand*, 2 Br. C. C. 652; *Goodright d. Tyrrell v. Mead*, 3 Burr. 1703; *Cheney v. Hall*, 2 Edm. 357; 3 Atk. 9.) A common recovery was a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee simple. (*Willes' Rep.* 451.) What passed by the recovery did not come out of the remainder or reversion, but in continuance of the estate tail, which was expanded into a fee simple, and persons coming in under the recovery were liable to all the charges created by the tenant in tail.

A mortgagee claiming under a recovery suffered expressly to his use was postponed to a settlement by lease and release made previous to marriage by a tenant in tail. (*Capel's case*, 1 Rep. 60; *Cheney v. Hall*, Ambl. 526; and see also *Goodright d. Tyrrell v. Mead*, 3 Burr. 1703; *Tourle v. Rand*, 2 Br. C. C. 652; *Stapleton v. Stapleton*, 1 Atk. 2.) But a recovery suffered by a tenant in tail, who had previously made a voluntary settlement, had not the effect of confirming it as against a mortgagee claiming under an instrument made subsequent to the recovery. (*Cormick v. Trapaud*, 6 Dow, 60.)

But as a fine levied by a tenant in tail operated as an extinguishment of the estate tail and passed a base or qualified fee, it only gave validity to his prior charges on the estate as against himself and the persons claiming under the entail, but not as against those claiming in reversion or remainder. The operation of a fine levied by a tenant in tail, who had the immediate reversion in fee in himself, was to merge the estate tail, and bring the reversion in fee into immediate possession, by which means it became liable to the incumbrances of all those who had been seised of it. Therefore, where A. settled his estate on himself for life, remainder to B. his eldest son in tail male; remainder to C. his youngest son, in like manner, remainder to his own right heirs; B. being in possession, granted leases, with covenants for a perpetual renewal, and afterwards died without issue, C. the remainder-man entered and levied a

fee, the uses of which were declared to himself in fee; it was held that C. was bound to a performance of B.'s covenants in the leases. (*Shelburn v. Biddulph*, 6 Br. P. C. 356, Toml. ed.; *Symonds v. Cudmore*, Show. 370; 8 C. 4 Mod. 1; 1 Salk. 338; *Skinn.* 284, 317, 328; 3 Salk. 336; *Carth.* 257; 12 Mod. 32; *Holt*, 666; 1 *Freem.* 503; 2 *Atk.* 204; see 7 *Ves.* 497; 2 *Atk.* 204.)

A base fee created by the lease and release of a tenant in tail might be confirmed by a subsequent fine levied, even after the death of the original releases, in pursuance of a prior covenant. (*Doe v. Michels*, 8 T. R. 211, 214.) But where the fee of an estate descended on a party who was equitable tenant in tail, under articles made on his father's marriage, and such son on his own marriage agreed to make a settlement of the estate upon himself and the issue of the marriage in the usual course of family settlement, and afterwards levied a fine, it was held that although the fine, without more, would have brought the reversion in fee into possession, yet, being coupled with a declaration of uses, the uses of the second settlement were substituted for those of the first, and that the reversion in fee did not come into possession so as to be liable to the father's judgment debts. (*Browne v. Blake*, 1 *Molloy*, 368.)



ENLARGEMENT OF BASE FEES.

XXXIX. And be it further enacted, that if a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act if such remainder or reversion had been vested in any other person. (h)

Base fees when united with the immediate reversions, enlarged instead of being merged.

(h) If a tenant in tail, with a reversion in fee to himself, levied a fine, the effect of that on the estate tail was to create a base fee, which became merged in the other fee, and let in all the incumbrances of the ancestor, which had frequently happened, in practice, from such a person being ill advised to

The effect of a fine in merging a base fee in the reversion.

levy a fine instead of suffering a recovery; generally speaking, when two estates unite in the same person in the same right, the smaller one is merged in the other, except in the case of an estate tail and a reversion in fee, which may exist together: in such a case, by the operation of the statute *de donis*, the estate tail is kept alive, not merged in the reversion in fee. (5 Term Rep. 109, 110; 2 Rep. 61; *Kynaston v. Clarke*, 2 Atk. 204; *Shelburn v. Biddulph*, 4 Br. P. C. 694.) A base fee will merge by union with the absolute fee; the possibility of reverter on a conditional fee at common law will merge in the fee simple absolute; (*Simpson v. Simpson*, 4 Bing. N. R. 333; see 2 Ves. sen. 35; Hob. 323; *Symonds v. Cudmore*, 1 Salk. 338; Carth. 258; *Crow v. Baldmere*, 5 T. R. 109;) an estate tail after possibility of issue extinct; (Co. Litt. 27 b;) an estate of mere freehold, legal or conventional, (Co. Litt. 338 b;) a term of years, (*Salmon v. Swann*, Cro. Jac. 619; *Hughes v. Robotham*, Cro. Eliz. 302,) or estate at will, (Vin. Abr. tit. Est. at Will,) will be extinguished by the acquisition of the fee. On the subject of merger of base fees, the real property commissioners made the following remarks: "If a tenant in tail, claiming the immediate remainder or reversion in fee, bars his estate tail by means of a fine instead of a recovery, he frequently prejudices his title by merging in the remainder or reversion the base fee acquired by the fine, as he thereby not only lets in all the charges and estates made and created by the persons through whom he derived the remainder or reversion, but also renders it necessary, afterwards, to make out his title to the remainder or reversion, which, in many instances, is attended with great difficulty and expense." (1 *Real Property Report*, p. 28; but see *Sperling v. Trevor*, 7 Ves. 497.) It will be observed that this difficulty is removed by this section of the act, by preserving base fees from merger, and enlarging them, when united with the immediate reversion, into as large an estate as the tenant in tail, if in possession, could have created.

The rule, that where there is in the same person a legal and equitable interest the former absorbs the latter, (*Wade v. Paget*, 1 Br. C. C. 367,) must be always understood with some qualification, as it holds only where the legal and equitable estates are co-extensive and commensurate, but is not admitted where a party has the whole legal estate and a partial equitable estate, as the latter will continue to subsist for the benefit of the person seized of the whole legal estate. (*Chempnoon v. Williams*, 2 Ch. C. 63-78; 1 Vern. 13; *Robinson v. Cummings*, Forr. 164; 1 Atk. 473; *Brydges v. Brydges*, 3 Ves. 126; see *Capel v. Girdler*, 9 Ves. 509; *Selby v. Alston*, 3 Ves. 339; *Alston v. Wells*, Dougl. 771, 2nd ed.) In order to effect a merger by the union of legal and equitable interests in the same party they must be of the same quality, and an estate tail and fee simple not being of the same

quity, an equitable estate tail in a copyhold does not merge by the accession of the legal fee. (*Merest v. James*, 6 Madd. 118; *Brown v. Blake*, 1 Molloy, 382.)

MODES OF BARRING ESTATES TAIL, &c.

XL. And be it further enacted, that every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: provided nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed; (i) and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed.

Tenant in tail to make a disposition by deed as if seized in fee, but not by will or contract; and if a married woman, with her husband's concurrence.

(i) This section of the act adopts an established rule that the issue in tail was not bound, either at law or in equity, to complete any contract or agreement made by his ancestor, respecting the estate tail, because the issue claims, by a paramount title *per formam doni*, from the person by whom the estate tail was originally granted, and not from his ancestors. (3 Rep. 41 b; 1 P. Wms. 271; 2 Ves. sen. 634; Hob. 203; 1 Ch. Cas. 171; 2 Ventr. 350; 1 Lev. 237; 2 Eq. Cas. Abr. 28, pl. 34; *Attorney-General v. Day*, 1 Ves. sen. 218.) And such rule applied although the ancestor had covenanted to levy a fine or suffer a recovery, and had received part, or even the whole of the purchase money, and a decree had been made against him to levy a fine or suffer a recovery; and he died in contempt and in prison for not obeying such decree. (Prec. Ch. 278; 2 Vern. 306; Gilb. Eq. R. 104;

Old rule as to effect of contract by tenant in tail.

1 Ves. sen. 224.) And even where tenant in tail, in pursuance of a covenant to settle a jointure, had acknowledged : fine, but died before it was perfected, the Court of Chancery refused to supply the defect against the issue. (2 Vern. 3. And the rule was, it seems, applicable to copyholds, and to equitable tenants in tail of lands whether freehold or copyhold (See Sugd. V. & P. 186, 8 ed.; 1 Prest. Conv. 153.) A decree directing the owner of a legal estate to do such acts as are requisite to bar the estate tail, but which are incomplete at his death, is not binding on the succeeding issue in tail (Frank v. Mainwaring, 2 Beav. 115; see 1 Ch. Cas. 171.) In considering the effect of this clause, the 22d and 23d sections of the act for the limitation of actions must be borne in mind. (See ante, pp. 183—185.)

Inrolment of Assurance.

Every assurance by a tenant in tail, except a lease not exceeding 21 years at a rack rent, or not less than five-sixths of a rack rent, to be inoperative unless inrolled in Chancery within six months, 38 H. 8, c. 16.

XLI. Provided always, and be it further enacted, that no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (except a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent, or not less than five-sixth parts of a rack rent,) shall have any operation under this act unless it be inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and if the assurance by which any disposition of lands shall be effected under this act shall be a bargain and sale, such assurance, although not inrolled within the time prescribed by the act passed in the twenty-seventh year of the reign of his majesty King Henry the Eighth, intituled "For Inrolment of Bargains and Sales," shall, if inrolled in the said Court of Chancery within the time prescribed by this clause, be as good and valid as the same would have been if the same had been inrolled in the said court within the time prescribed by the said act of Henry the Eighth. (k)

(k) Where deeds are to be executed by parties abroad,

there may in some cases be a difficulty, if not an impossibility, of having them returned within the six months. It would have been proper to have extended the period for enrolment in such cases. The enrolment of the deed of disposition under stat. 3 & 4 Will. 4, c. 74, may be made immediately upon the execution of the deed, and may be effected either by the vendor or the purchaser; and as the enrolment relates to the execution of the deed, it follows that a tenant in tail who has not barred the entail under the statute, can nevertheless make a good title in fee simple. (*Castell v. Corvill*, 4 Y. & Coll. 228.) If the disentailing deed requires enrolment or registration by any other statute, the requisitions of such statute must be observed; if lands lie within a registry district, the deed must be registered; and if it be the grant of an annuity within the statutes 53 Geo. 3, c. 141, 3 Geo. 4, c. 92, 7 Geo. 4, c. 75, a memorial must be enrolled. But the enrolment of a bargain and sale, or of a conveyance to charitable uses, according to this act, will satisfy the requisition of the statutes 27 Hen. 8, c. 13, 9 Geo. 2, c. 36.

Enrolment is not necessary in the case of copyholds, except on the court rolls, see s. 54, *post*, 343.

Consent of Protector how to be given.

XLII. And be it further enacted, that the consent of the protector of a settlement to the disposition under this act of a tenant in tail shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void.

Consent of the protector to be given by the same assurance or by a distinct deed.

Consent by distinct Deed.

XLIII. And be it further enacted, that if the protector of a settlement shall, by a distinct deed, give his consent to the disposition of a tenant in tail, it shall be considered that such protector has given an absolute and unqualified consent, unless in such deed he shall refer to the particular assurance by which the disposition shall be effected, and shall confine his consent to the disposition thereby made.

If by distinct deed, to be considered unqualified, unless he refer to the assurance.

Consent irrevocable.

Protector not
to revoke his
consent.

XLIV. And be it further enacted, that it shall not be lawful for the protector of a settlement who under this act shall have given his consent to the disposition of a tenant in tail, to revoke such consent.

Consent of Married Women.

A married
woman pro-
tector to con-
sent as a feme
sole.

XLV. And be it further enacted, that any married woman, being either alone or jointly with her husband protector of a settlement, may under this act, in the same manner as if she were a feme sole, give her consent to the disposition of a tenant in tail.

Inrolment of distinct Deed.

Consent of a
protector by
distinct deed
void, unless
inrolled with
or before the
assurance.

XLVI. Provided always, and be it further enacted, that the consent of a protector to the disposition of a tenant in tail shall, if given by a deed distinct from the assurance by which the disposition shall be effected by the tenant in tail, be void, unless such deed be inrolled in his Majesty's High Court of Chancery either at or before the time when the assurance shall be inrolled.

Exclusion of Jurisdiction of Equity.

Courts of
equity ex-
cluded from
giving any
effect to dis-
positions by
tenants in tail,
or consents of
protectors of
settlements,
which in
courts of law
would not be
effectual.

XLVII. And be it further enacted, that in cases of dispositions of lands under this act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this act to tenants in tail, or of the powers of consent given by this act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and con-

not respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a court of law would not be an effectual disposition or consent under this act; and that no disposition of lands under this act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this act in a court of law.

Consent of Lunatic, &c. how to be given.

XLVIII. Provided always, and be it further enacted, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement, such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said Court of Chancery (as the case may be,) while protector of such settlement, shall, on the motion or petition in a summary way by a tenant in tail under such settlement, have full power to consent to a disposition under this act by such tenant in tail, and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid shall be such as shall be approved of by such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said Court of Chancery (as the case may be;) and it shall be lawful for such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said Court of Chancery (as the case may be,) to make such orders in the matter as shall be thought necessary; (1) and if such Lord

Lord Chancellor, &c. to have the power to consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary; and if any other person shall be joint protector, the disposition not to be valid without his consent.

High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said Court of Chancery, (as the case may be,) shall, in lieu of any such person as aforesaid, be the protector of a settlement, and there shall be any other person protector of the same settlement jointly with such person as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person being protector as aforesaid shall consent thereto in the manner in which the consent of the protector is by this act required to be given.

(1) An order has been made by the Lord Chancellor, as protector, for enabling a *quasi* tenant in tail in remainder of a sum of stock, of which the tenant for life was a lunatic, to dispose of the fund.

Cases as to
the exercise
of the power
of consenting,
given to the
Lord Chan-
cellor.

In *Grant v. Yes*, 3 M. & Keen, 245, the lunatic was tenant for life, and his eldest son *quasi* tenant in tail in remainder, of a sum in the three per cent. consols, being the produce of lands which had been sold under an order of the court, and declared to be subject to the same uses as the lands had been subject to. The son petitioned that the Lord Chancellor, as protector under the above act, would concur with the petitioner in barring the estate tail and ulterior limitations to which the stock was subject, for the purpose of enabling the petitioner to convert the stock into money, to be applied in the purchase of a commission in the army. It was stated in an affidavit made in support of the petition by the lunatic's brother-in-law, who was committee of the estate, that the lunatic was in a state of hopeless lunacy; that he was possessed of landed estates of the value of 2500*l.* a year, and of property in the funds yielding an annual income of 400*l.*; that a yearly allowance of 1300*l.* was made to his wife for the maintenance of the lunatic; and that the petitioner, who was a lieutenant in the army, had an allowance of 400*l.* a year out of the estate; that the purpose to which the principal part of the money in question was to be applied was the purchase of a captain's commission for the petitioner, who had entered the army with the full approbation of his father, and who, it was represented, had now a favourable opportunity of purchasing a step. The 15th, 22nd, 33rd, 48th, 49th, and 71st sections of the act were referred to. The committee of the estate and next of kin, and the lunatic's younger brother, who had a charge upon the fund, consented to the application. Lord Chancellor Brougham expressed his opinion that this was a case which fell within the provisions of the 33rd and 48th sections of the act referred to, and that the circum-

stances were such as to justify him in exercising his discretion. The master to whom a reference was made having found the facts stated in the petition, an order was made directing the stock to be sold, and the produce to be paid to the committee, to be applied for the advancement of the petitioner in the army, and that the petitioner's allowance out of his father's estate should be reduced to the extent of the dividends of the stock sold.

In *re Blewitt*, (3 M. & Keen, 250,) an estate was settled by will upon the first and other sons of the testator's son in tail male, with remainder to his daughters in tail general, with remainder over to collateral relations. The eldest son of the testator was tenant in tail in possession, and was a bachelor of the age of thirty-six, and had been for many years in a state of hopeless lunacy; the second son, and next tenant in tail in remainder, was married but had no issue; a third son had died leaving an infant daughter. The testator's son had only one daughter, who was then married. The second son presented a petition, in which, in addition to the above facts, it was represented that if the petitioner and his sister should die in the lifetime of the lunatic without issue, and without having barred the estate tail limited to them by the will of their grandfather, the estate would go over to the lunatic's collateral relations, to the exclusion of the infant daughter of his deceased younger brother. The petition therefore prayed that the Lord Chancellor would consent to the petitioner's disposing of the settled estate, so as to enable him to acquire an estate in fee simple therein, saving only the rights of persons in respect of estates prior to the estate tail vested in the petitioner. According to the report of this case, the counsel for the petitioner admitted that the 22nd section of the 3 & 4 Will. 4, c. 74, coupled with the 33rd and 48th sections, provided in terms only for the case of a lunatic who was tenant for life of a settled estate; but he contended that the reason for calling in aid the authority of the Lord Chancellor seemed equally strong if not stronger where the lunatic had a larger interest; and perhaps, therefore, the equity of the statute might be extended to such a case, if the court saw upon the circumstances disclosed a sufficient ground for the exercise of its discretionary jurisdiction. Lord Brougham refused to make any order, observing that, according to the inclination of his opinion, the act did not give him any authority to interfere in such a case; but even assuming that he possessed such authority, he did not think that any sufficient ground had been stated in the petition to induce him to exercise a discretionary jurisdiction in the present instance. And on a similar application in the same case being afterwards made by the same party to Lord Lyndhurst, his lordship thought that he had no jurisdiction, and declined to make any order. An application by a tenant in tail in remainder to the Lord Chancellor, as protector, to consent to bar the remainder in tail, was refused where the lunatic was the first tenant in tail with reversion to him in fee. In *re Wood*, (3 My. & Cr. 266,) appli-

cation was made to the Lord Chancellor, as protector (in place of a lunatic) of a settlement created by will, to give his assistance in barring an estate tail in remainder, the lunatic being first tenant in tail, with the ultimate reversion to the testator's right heirs, the lunatic being such heir. The application was on the petition of a husband and his wife, the latter being the tenant in tail in remainder, for the purpose of barring her estate tail in remainder, and of limiting the estate to herself in fee in remainder expectant on the decease and failure of the issue of the lunatic, who was sixty-five, and had never been married. Lord *Cottenham*, upon the authority of the preceding case, thought that he was not protector of the settlement within the act of parliament. If, however, he had the power which he was asked to exercise, his lordship thought that he should not be justified in so dealing with the lunatic's property. The lunatic had the whole interest in the estate, except the intermediate interest in the female petitioner, and if that should drop during his life, he would have the absolute interest.

The principles by which the Lord Chancellor, when protector of the settlement in the place of a lunatic, will be guided in giving or withholding his consent, are more fully laid down in a case which came before Lord *Cottenham*. In *re Newman*, (2 Myl. & Cr. 112), the lunatic was tenant for life, with remainder to his children as tenants in common in tail, with remainder over to the brother and sisters of the lunatic as tenants in common in tail, with an ultimate remainder to the right heirs of the testator. The lunatic was forty-three years old, had no child, and was unmarried. The eldest son of the testator, and eldest brother of the lunatic, was the testator's heir at law; and he had a remainder in tail in one sixth, with the ultimate remainder in fee in the entirety. Application was made to the court by the husband of one of the daughters of the testator, who was entitled, in default of issue of the lunatic, to an estate tail in one sixth, praying that the Lord Chancellor would consent on behalf of the lunatic tenant for life to a deed, the object of which was to bar the issue of that daughter, and of course to destroy the remainder to the heirs of the settlor, in order to give this share of the property to the husband and wife to dispose of as they pleased, for it was proposed to be settled to such uses as they should appoint. Lord *Cottenham*, C., in delivering judgment, said, "This petition came before me as protector of the settlement under the Fines and Recoveries Act, to induce me to consent to a deed of disposition on the part of the lunatic, who is tenant for life, to act, in fact, for the tenant for life, in order to give effect to a recovery, (*thereby meaning a deed of disposition under this act.*) As protector of the settlement, the only duty of the court is, to see what, in reference to the interests of the family, it would be proper for the tenant for life to do; and the object must be rather to protect the objects of the settlement, than to give any benefit to one member of the family to

the exclusion of the others. Now, if nothing is done, one sixth will go to this daughter and her children if she has any, and if not, to the eldest son of the testator as his right heir; and I am asked to consent to that which will take it away from the eldest son, and take it away from the family, by giving it to the husband of the daughter. That would be any thing but protecting the settlement; it would be destroying the settlement; giving the estate to a person not a member of the family, namely, the husband of the daughter. I should not consider that it would be a proper act for the tenant for life to concur in a deed of disposition to that effect."

The court has no jurisdiction under stat. 1 Will. 4, c. 65, and 3 & 4 Will. 4, c. 74, to authorize the committee of the estate of a lunatic tenant in tail in possession, to grant leases of the lunatic's estate for a term of twenty-one years, so as to bind the remainder-man. (*In re Starkie*, 3 M. & Keen, 247.)

Evidence of Consent for a Lunatic, &c.

XLIX. Provided always, and be it further enacted, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement, no document, or instrument, as evidence of the consent of such protector to the disposition of a tenant in tail under such settlement, shall be requisite beyond the order in obedience to which the disposition shall have been made.

Order of the Lord Chancellor, &c. to be evidence of consent.

ESTATES TAIL IN COPYHOLDS.

Qualified Application of previous Clauses to.

L. And be it further enacted, that all the previous clauses in this act, so far as circumstances and the different tenures will admit, shall apply to lands held by copy of court roll, except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be an

The previous clauses to apply to copyholds, with certain variations.

estate at law, shall be made by surrender, and except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be merely an estate in equity, may be made either by surrender, or by a deed as hereinafter provided, and except so far as such clauses are otherwise altered or varied by the clauses hereinafter contained. (m)

(m) Copyholds are not within the *stat. de donis*, (13 Edw. 1, c. 1; Cro. Car. 44, 45;) and therefore not entailable, except by special custom; (*Doe v. Truby*, 2 W. Bl. 946; 3 Dougl. 303;) and where no such custom exists in the manor, the party who would otherwise be tenant in tail, will take a fee simple conditional at common law; (*Doe d. Spencer v. Clark*, 5 B. & Ald. 458. See *ante*, p. 273.)

Old modes of
barring entails in copy-
holds.

Before the passing of this act there were several modes of barring entails in copyholds besides that by recovery.—By forfeiture and regrant, a custom said to be peculiar to the manor of Wakefield; (*Pilkington v. Stanhop*, 1 Sid. 314; S. C. 2 Keb. 127;) although it seems that it would have been effectual if established in any other manner. (*Pilkington v. Bagshaw*, Sty. 450; *Carr v. Singer*, 2 Ves. sen. 606.) Concurrent customs in a manor court to bar entails in copyholds, by recovery and by surrender, were good; (*Doe d. Whalhead v. Ossingbrooke*, 2 Bing. 70; *Everall v. Smalley*, 2 Str. 1197; S. C. 1 Wils. 26; *Doe v. Truby*, 2 W. Bl. R. 944;) and slight evidence was held sufficient to prove the latter, because it was adverse to the interest of those who made the evidence. (*Doe d. Dauncey v. Dauncey*, 7 Taunt. 674. See *Roe d. Bennett v. Jeffery*, 2 Maule & Selw. 92; *Doe v. Mason*, 3 Wils. 63.) And as a custom of entailing copyhold estates would create a perpetuity, unless there were some means devised to bar them, it has been adjudged, that where there was no custom to bar the entail by recovery, it might be barred by common surrender, or even by a surrender to the use of a will, (*Carr v. Singer*, 2 Ves. sen. 606,) by three judges, against the opinion of Willes, C.J. who thought a recovery was the proper method of barring the entail. (See 1 Watk. on Cop. 178; 1 Scriv. on Cop. pp. 71—75, 3rd ed.) Before this act the same mode of barring an equitable entail in copyholds must have been pursued, as was required by the special custom of the manor, for barring an entail in the legal estate. (3 Ves. 127; 3 Atk. 815; 1 Watk. on Cop. 180, 181.) It will be seen that by the new act, an equitable entail in copyholds may be barred, either by surrender or by deed. (See *post*, s. 53. p. 341.)

Consent of Protector by Deed.

LI. Provided always, and be it further enacted, As to the deed of consent and the entry of it on the court rolls where the protector of a settlement of copyholds consents by deed to the disposition of a tenant in tail. that if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall be given by deed, such deed shall, either at or before the time when the surrender shall be made by which the disposition shall be effected, be executed by such protector, and produced to the lord of the manor of which the lands are parcel, or to his steward, or to the deputy of such steward; and the consent of such protector shall be void unless such deed shall be so executed and produced; and on the production of the deed the lord, or steward, or deputy steward, shall, by writing under his hand, to be indorsed on the deed, acknowledge that the same was produced within the time limited, and shall cause such deed, with the indorsement thereon, to be entered on the court rolls of the manor; and the indorsement, purporting to be so signed, shall of itself be *prima facie* evidence that the deed was produced within the time limited, and that the person who signed the indorsement was the lord of the manor, or his steward, or the deputy of such steward; and after such deed shall have been so entered the lord of the manor or his steward, or the deputy of such steward, shall indorse thereon a memorandum signed by him, testifying the entry of the same on the court rolls.

Consent of Protector not by Deed.

LII. Provided always, and be it further enacted, As to the consent of the protector of a settlement of copyholds when not given by deed, and the preserving of evidence of the same on the court rolls. that if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall not be given by deed, then and in such case the consent shall be given by the protector to the person taking the surrender by which the disposition shall be effected; and if the surrender shall be made out of court, it shall be expressly stated in the memorandum of

such surrender that such consent had been given and such memorandum shall be signed by the protector; and the lord of the manor of which the lands are parcel, or his steward, or the deputy of such steward, shall cause the memorandum, with such statement therein as to the consent, to be entered on the court rolls of the manor; and such memorandum shall be good evidence of the consent and of the surrender therein stated to be made; and the entry of the memorandum on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof; but if the surrender shall be made in court, the lord of the manor, or his steward, or the deputy of such steward, shall cause an entry of such surrender, containing a statement that such consent had been given, to be made on the court rolls; and the entry of such surrender on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof. (n)

Evidence of
entries in
court rolls.

(n) A copy of a court roll under the steward's hand is good evidence to prove the copyholder's estate, so an examined copy of the court roll is good evidence, if sworn to be a true one. (1 Keb. 567, 720; Comb. 138, 337; 12 Mod. 24; Bull. N. P. 247 a, 7th edit.) A surrender and admittance may be proved by the original entries made by the steward, without producing a copy stamped, as required by stat. 48 Geo. 3, c. 149. (*Doe d. Bennington v. Hail*, 16 East, 208.)

Where a surrender of a copyhold was duly made and presented by the homage, but no entry of such surrender and presentment was made on the court rolls, it was held that such surrender and presentment might be proved by a draft of an entry produced from muniments of the manor, and the parol testimony of the foreman of the homage who made such presentment. (*Doe d. Priestly v. Calloway*, 6 Barn. & Cres. 484.)

The provisions in statute 48 Geo. 3, c. 149, ss. 32, 33, requiring every surrender of copyhold, and admittance, &c. made out of court, or a memorandum thereof, to be stamped; and in cases of surrender, &c. in court, the steward to make and deliver to the tenant a stamped copy of the court roll, are merely revenue regulations, and not intended to vary the rules of evidence; and, therefore, a surrender and admittance out

of court (presented and inrolled afterwards) may be proved by an examined copy of the court roll, without producing the original surrender, &c. or memorandum thereof. (*Doe d. Cuthbert v. Mes*, 4 B. & Ad. 617.) In ejectment for copyholds, the court rolls of the manor, containing an entry of a presentment by the homage of a surrender to the plaintiff out of court, and of his admittance, are evidence of his title against the alleged surrenderor. (*Doe d. Garrod v. Olley*, 4 P. & Dav. 275; 12 Ad. & Ell. 481.)

Disposition of equitable Estates Tail in Copyholds.

LIII. Provided always, and be it further enacted, that a tenant in tail of lands held by copy of court roll, whose estate shall be merely an estate in equity, shall have full power by deed to dispose of such lands under this act in the same manner in every respect as he could have done if they had been of freehold tenure; and all the previous clauses in this act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause; and the deed by which the disposition shall be effected shall be entered on the court rolls of the manor of which the lands thereby disposed of may be parcel; and if there shall be a protector to consent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of the manor, or his steward, or the deputy of such steward, when required so to do, to enter such deed or deeds on the court rolls, and he shall indorse on each deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls: Provided always, that every deed by which lands held by copy of court roll shall be disposed of under this clause, by

Power to equitable tenants in tail of copyholds to dispose of their lands by deed.

an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the court rolls of the minor* of which lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls of such manor before the subsequent assurance shall have been entered (o).

This act does not extend to customary freeholds.

(o) The 53d section only applies to equitable estates of tenants in tail of lands held by copy of court roll; the court, therefore, refused a mandamus to the lord of a manor, commanding him to enter on the court rolls an indenture touching certain customary freehold hereditaments, although it appeared that the steward of the manor was accustomed to give admittances signed by him to the grantee of such hereditaments, but did not enrol the deed by which they were granted. (*Reg. v. Ingleton (Lord of Manor)*, 8 Dowl. P. C. 693.) This was a rule calling on the lord and steward of the manor of Ingleton, in the West Riding of Yorkshire, to show cause why a mandamus should not issue, directing them to enter on the rolls an indenture concerning certain customary freehold lands within the manor. It appeared that a testator devised the customary freeholds to trustees upon trust for W. O. for life, and then to his first and other sons in tail in strict settlement. W. O. and his eldest son being desirous to bar the equitable entail in these customary lands, did, on the 29th July, 1839, execute an indenture of bargain and sale, by which the lands were conveyed to W. W., upon trust for W. O., his heirs and assigns for ever. The lands in question were parcel of the manor of Ingleton, and there were payable in respect of them to the lords of the manor certain fixed rents, suits and services. The lands were not held by copy of court roll, nor did they pass by surrender and admittance, but were conveyed by deed in the nature of a grant, whose operative words were—"grant, bargain, sell, alien, surrender and convey." The habendum ran thus: "to hold to the said (purchaser), his heirs and assigns for ever, according to the custom of the said manor, and under the rents, dues, suits and services, usual and accustomed." Such deeds are not enrolled on the court rolls, but remain with the purchaser; and on their production at a subsequent court, it is customary for such purchaser to receive an admittance engrossed on plain parchment, signed by the steward, and this constitutes him legal tenant. By the custom of the manor persons claiming to be equitably interested are not recognized; but it is otherwise as regards the last legal tenant, the claims of whose heir, devisee or grantee, are acknowledged. It is also the custom of the manor that entails affecting the cus-

tenancy lands may be barred by surrender to a trustee, on which surrender certain fines are payable to the lord. It further appeared that there were no court rolls—nothing but the verdicts of the juries in loose sheets, and signed by the juries successively; nor has the steward the power to make any entry on their papers, unless at the holding of a court. On the 1st December, 1824, the trustees, under the testator's will, had been admitted tenants, and their admittance stated the nature of the estate which they held. One of the trustees having since died, the surviving trustee, in whom the legal estate was, had given a notice to the steward not to admit any other person as tenant. In pursuance of the act 3 & 4 Will. 4, c. 74, an application was made to enter the indenture of the 29th July, 1839, on the court rolls. That application having been refused, a rule was obtained for a mandamus, which was discharged on the ground that the 53d section of the act was inapplicable, and no other provision was made by the statute for estates of this tenure. (*Reg. v. The Lord and Steward of the Manor of Ingletou*, 4 Jurist, 700; see *Carlisle v. Towns*, 2 B. & Ad. 585.)

In applying for a mandamus to the steward of a manor to Mandamus. enroll a deed of disposition pursuant to stat. 3 & 4 Will. 4, c. 74, s. 53, it is not necessary to annex a copy of the deed itself, if the contents are stated in the affidavit. (*Crosby v. Fettescu*, 5 Dowl. P. C. 273.)

Dispensation with Inrolment.

LIV. Provided always, and be it further enacted, that in no case where any disposition under this act of lands held by copy of court roll, by a tenant in tail thereof, shall be effected by surrender or by deed, shall the surrender or the memorandum, or a copy thereof, or the deed of disposition, or the deed, if any, by which the protector shall consent to the disposition, require inrolment, otherwise than by entry on the court rolls.

Inrolment
not necessary
as to copy-
holds.

BANKRUPT'S ESTATE TAIL.

Partial Repeal, 6 Geo. 4, c. 16.

LV. And be it further enacted, that after the thirty-first day of December one thousand eight hundred and thirty-three, so much of an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An Act to

Repeal of the
Bankrupt
Act, 6 G. 4,
c. 16, s. 63,
so far as re-
lates to es-
tates tail, but
not to extend

to lands of a bankrupt under a commission or fiat issued on or before the 31st of Dec. 1833, nor to revive former acts.

amend the Laws relating to Bankrupts," as empowers the commissioners named in any commission of bankrupt issued against a tenant in tail to make sale of any lands, tenements, and hereditaments, situate either in England or Ireland, whereof such bankrupt shall be seised of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown, shall be and the same is hereby repealed: Provided always, that such repeal shall not extend to the lands, whatever the tenure may be, of any person adjudged a bankrupt under any commission of bankrupt, or under any fiat which, in pursuance of the said act of the sixth year of the reign of King George the Fourth, or of any former act concerning bankrupts, or of an act passed in the first and second years of the reign of his Majesty King William the Fourth, intituled "An Act to establish a Court of Bankruptcy," hath been or shall be issued on or before the thirty-first day of December one thousand eight hundred and thirty-three: Provided also, that such repeal shall not have the effect of reviving in any respect the acts repealed by the said act of the sixth year of the reign of King George the Fourth, or any of them. (*p*)

Power of commissioners under former bankrupt acts.

(*p*) By stat. 6 Geo. 4, c. 16, s. 65, (re-enacting the 21 Jac. 1, c. 19, s. 12,) it was enacted, that the commissioners should, by deed indented and inrolled, make sale, for the benefit of the creditors, of any lands, tenements, and hereditaments, situate either in England or Ireland, whereof the bankrupt was seised of any estate tail in possession, reversion or remainder, and whereof no reversion or remainder was in the crown the gift or provision of the crown; and every such deed should be good against the bankrupt, and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt, by fine, common recovery, or any other means, might cut off or debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, and hereditaments.

Where a remainder-man in tail became a bankrupt, the commissioners could only convey a base fee, and even where a joint commission issued against the tenant for life and the

tenant in tail in remainder, it was held that the execution of the power by the commissioners operated separately on each estate, and that when executed it could not do more than convey an estate for life and a base fee. (*Jervis v. Taylor*, 1 B. & Ald. 567.) Where there is no custom of entailing lands in a manor under a limitation to a man and the heirs of his body, he takes a fee simple conditional, which might have been conveyed during the life of the bankrupt by the commissioners, under the provisions of the 13 Eliz. c. 7, s. 11; and notwithstanding his death before any such conveyance, the commissioners might execute a valid conveyance of such estate after his death, pursuant to stat. 1 Jac. 1, c. 16, s. 17. (*Des d. Spencer v. Clark*, 5 B. & Ald. 458.) In that case it was observed by Holroyd J., that it was unnecessary to determine what would be the effect of a bargain and sale executed by the commissioners after the death of the bankrupt, in a case where, during his life, he had been seised of an estate tail. But it seems, by a recent case, (*Ex parte Somerville in re Lescombe*, 1 Mont. & Ayr. 408,) that an estate tail passed by the common bargain and sale, which used to be made to the assignees; and that under the 65th section of 6 Geo. 4, c. 16, the commissioners can convey an estate tail, of which the bankrupt was seised, after his death, or if not, that the commissioners would be justified in executing such a conveyance, in order to have the question settled.

Where a tenant in tail, having mortgaged his estate, afterwards became bankrupt, it was held that his assignees under the commission took the estate discharged of the mortgage. (*Beck v. Welsh*, 1 Wils. 276.) But if the bankrupt had covenanted with the mortgagee for further assurance, a court of equity would compel the assignees either to redeem or be foreclosed, and execute proper conveyances to the mortgagee. (*Pye v. Daubuz*, 3 Br. C. C. 595; *Edwards v. Appleby*, 2 Br. C. C. 652, n.; see Coote on Mortgages, 214—222.) Under the 6 Geo. 4, c. 16, s. 65, the equitable mortgagee of a bankrupt tenant in tail was entitled to have his lien made good as against the fee simple of the premises of which the bankrupt was seised in tail. (*Ex parte Wise*, 1 Mont. & Macarthur. 65.)

The stat. 6 Geo. 4, c. 16, s. 70, does not enable the assignees of a bankrupt mortgagor to re-vest the legal estate in themselves by tender or payment to the mortgagee after the day on which, by the deed, the mortgage becomes absolute in default of payment; though a tender or payment before the day will, under that section, vest the legal estate in them. (*Dunn v. Massey*, 6 Ad. & El. 479; 1 Nev. & P. 578.) Where a legal mortgage was executed by the bankrupt in pursuance of a previous equitable mortgage, but not till after the mortgagee had notice of the act of bankruptcy, and was consequently an unavailable security; it was held, that it did not operate as a merger of the equitable mortgage, and that the party was entitled to the usual order as equitable mortgagee. (*Ex parte*

Harvey, re Emery, 3 Dea. 647; 4 Dea. 52; see *Ex parte Haines in re Barnett*, 4 Dea. 20.) Although an equitable mortgagee gives notice to the tenant to pay him the rent, he does not thereby entitle himself to the rent accruing before the order for sale. (*Ex parte Scott, re Pearson*; *Ex parte Burrell, re Norman*, 3 Dea. 76; *Ex parte Somerville*, 3 D. & Ch. 668; 1 Mont. & A. 409.) Where the deposit was of deeds conveying an equity of redemption of premises in fee, of which the party subsequently paid off the mortgage, it was held that the creditor was entitled to the full benefit of the security so exonerated; so also of shares in estates at the time of the deposit, undivided, but for the equality of partition of which the bankrupt had subsequently paid a consideration, and acquired the entirety of a portion. (*Ex parte Bisdale*, 1 Mont. D. & G. 333.)

Where the mortgage deed contained a covenant not to call in the mortgage money for five years, if the interest were paid regularly, it was held that on the bankruptcy of the mortgagor, the mortgagee claiming to prove was entitled to the usual order of sale. (*Ex parte Bignold*, 3 Dea. 161; 3 Mont. & A. 477; see *Ex parte Jones*, 4 Dea. 750.)

Actual Tenant in Tail.

The commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st of Dec. 1833, by deed to dispose of the lands of the bankrupt to a purchaser.

LVI. And be it further enacted, that any commissioner acting in the execution of any fiat which after the thirty-first day of December one thousand eight hundred and thirty-three shall be issued in pursuance of the said act, passed in the first and second years of the reign of King William the Fourth, under which any person shall be adjudged a bankrupt who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail in lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this act at the time of such disposition: Provided always, that if at the time of the disposition of such lands, or any of them, by such commissioner as aforesaid, there

shall be a protector of the settlement by which the estate of such actual tenant in tail in the lands disposed of by such commissioner was created, and the consent of such protector would have been requisite to have enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this act have disposed of the same, and such protector shall not consent to the disposition, then and in such case the estate created in such lands, or any of them, by the disposition of such commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this act in such lands without the consent of the protector.

Base Fee.

LVII. And be it further enacted, that any commissioner acting in the execution of any such fiat as aforesaid, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of the person so entitled as aforesaid, provided at the time of the disposition there be no protector of the settlement by which the estate tail converted into the base fee was created; and by such disposition the base fee shall be enlarged into as large an estate as the same could at the time of such disposition have been enlarged into under this act by the person so entitled if he had not become bankrupt.

Commissioner in case of a tenant in tail entitled to a base fee becoming bankrupt, and of there being no protector, by deed to dispose of the lands of the bankrupt to a purchaser.

Consent of Protector.

LVIII. And be it further enacted, that the commissioner acting in the execution of any such fiat as aforesaid under which a person being, or

As to the consent of the protector in case of bankruptcy.

before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, shall, if there shall be a protector of the settlement by which the estate tail of such actual tenant in tail, or the estate tail converted into a base fee (as the case may be), was created, stand in the place of such actual tenant in tail, or tenant in tail so entitled as aforesaid, so far as regards the consent of such protector; and the disposition of such lands, or any of them, by such commissioner as aforesaid, if made with the consent of such protector, shall, whether such commissioner may have made under this act a prior disposition of the same lands without the consent of such protector or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any acts hereafter to be passed concerning bankrupts, have the same effect as such disposition would have had if such actual tenant in tail, or tenant in tail so entitled as aforesaid, had not become bankrupt, and such disposition had been made by him under this act, with the consent of such protector; and all the previous clauses in this act, in regard to the consent of the protector to the disposition of a tenant in tail of the lands not held by copy of court roll, and in regard to the time and manner of giving such consent, and in regard to the enrolment of the deed of consent, where such deed shall be distinct from the assurance by which the disposition of the commissioner shall be effected, shall, except so far as the same may be varied by the clause next hereinafter contained, apply to every consent that may be given by virtue of this present clause.

Enrolment, &c. of Deeds of Disposition and Consent.

As to the enrolment in

LIX. And be it further enacted, that every deed by which any commissioner acting in the

execution of any such fiat as aforesaid, shall, under this act, dispose of lands not held by copy of court roll, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands held by copy of court roll, shall be entered on the court rolls of the manor of which the lands may be parcel; and if there shall be a protector who shall consent to the disposition of such lands held by copy of court roll, and he shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the commissioner; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of every manor of which any lands disposed of under this act by any such commissioner as aforesaid may be parcel, or the steward of such lord, or the deputy of such steward, to enter on the court rolls of the manor, every deed required by this present clause to be entered on the court rolls, and he shall indorse on every deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls.

Chancery of the deed of disposition of freehold lands, and the entry on the court rolls of the deed of disposition of copyhold lands, and of the deed of consent.

Enlargement of Base Fees.

LX. And be it further enacted, that if any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of any lands of any tenure, of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement by which the estate of such actual tenant in tail was created and of his not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such settlement, then and in such

Subsequent enlargement of base fees created by the disposition of the commissioner.

case, and immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the disposition by such commissioner as aforesaid there had been no such protector.

Enlargement of Base Fees subsequent to Conveyance.

Enlargement of base fees subsequent to the sale or conveyance of the same under the Bankrupt Acts.

LXI. And be it further enacted, that if a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the adjudication of such bankruptcy there had been no such protector, and the commissioner acting in the execution of the fiat under which the tenant in tail so entitled shall have been adjudged a bankrupt had disposed of such lands under this act.

Confirmation of voidable Estates.

A voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming

LXII. Provided always, and be it further enacted, that where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created or shall hereafter create in such lands or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid,

shall be adjudged a bankrupt under any such fiat as aforesaid, and the commissioner acting in the execution of such fiat shall make any disposition under this act of the lands in which such voidable estate shall be created or any of them, then and in such case, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under this act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the said acts of the sixth year of King George the Fourth and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; and if at the time of the disposition by such commissioner, in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not without such consent have been capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under this act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the

bankrupt, confirmed by the disposition of the commissioner, if no protector, or being such with his consent, or on there ceasing to be a protector; but not against a purchaser without notice.

disposition by such commissioner, then and in such case such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons except those whose rights are saved by this act : Provided always, that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed against such purchaser and the persons claiming under him.

Avoidance of Acts of Bankrupt.

Acts of a bankrupt tenant in tail void against any disposition under this act by the commissioner.

LXIII. And be it further enacted, that all acts and deeds done and executed by a tenant in tail of lands of any tenure, who shall be adjudged a bankrupt under any such fiat as aforesaid, and which shall affect such lands, or any of them, and which, if he had been seised of or entitled to such lands in fee simple absolute, would have been void against the assignees of the bankrupt's estate, and all persons claiming under them, shall be void against any disposition which may be made of such lands under this act by such commissioner as aforesaid.

Powers of Bankrupts reserved, where.

Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt tenant in tail shall retain his powers of disposition.

LXIV. Provided always, and be it further enacted, that, subject and without prejudice to the powers of disposition given by this act to the commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, and also subject and without prejudice to the estate in such lands which may be vested in the assignees of the bankrupt's estate, and also subject and without prejudice to the rights of all persons claiming under the said

assignees in respect of such lands or any of them, such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall have the same powers of disposition under this act in regard to such lands as he would have had if he had not become bankrupt.

Disposition where Bankrupt is dead.

LXV. And be it further enacted, that any disposition under this act of lands of any tenure by any commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of such lands, or a tenant in tail entitled to a base fee in such lands, shall be adjudged a bankrupt, shall, although the bankrupt be dead at the time of the disposition, be in the following cases as valid and effectual as the same would have been, and have the same operation under this act as the same would have had, if the bankrupt were alive; (that is to say,) in case at the time of the bankrupt's decease there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall at the time of the disposition be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue who if the base fee had not been created would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement who, in the

The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if the bankrupt be dead, have in the cases herein mentioned the same operation as if he were alive.

manner required by this act, shall consent to the disposition.

Disposition of Copyholds.

Every disposition by the commissioner of copyhold lands, where the estate shall not be equitable, to have the same operation as a surrender; and the person to whom such land shall have been disposed of may claim to be admitted on paying the fines, &c.

LXVI. And be it further enacted, that every disposition which under this act may be made by any commissioner acting in the execution of any such fiat as aforesaid of lands held by copy of court roll shall, in every case in which the estate of the bankrupt in such lands shall not be merely an estate in equity, operate in the same manner as if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, been duly surrendered into the hands of the lord of the manor of which they may be parcel, to the use of the person to whom the same shall have been disposed of by such commissioner; and the person to whom the lands shall have been so disposed of by such commissioner may claim to be admitted tenant of such lands, to hold the same by the ancient rents, customs, and services, in the same manner as if such lands had been duly surrendered to his use into the hands of the lord of the manor of which such lands may be parcel, and shall, upon being admitted tenant of such lands, to hold the same as aforesaid, pay the fines, fees, and other dues which could have been lawfully demanded upon such admittance if such lands had, for the same estate which shall have been required by the disposition by such commissioner as aforesaid, passed by surrender into the hands of the lord, to the use of the person so admitted.

Rents, Covenants, and Conditions.

Assignees to recover rents of the lands of a bankrupt of which the commissioner has power to make disposition, and to enforce cove-

LXVII. And be it further enacted, that the rents and profits of any lands of which any commissioner acting in the execution of any such fiat as aforesaid hath power to make disposition under this act shall in the meantime and until such disposition shall be made, or until it shall be ascertained that such disposition shall not be required for the

benefit of the creditors of the person adjudged bankrupt under the fiat, be received by the assignees of the estate of the bankrupt, for the benefit of his creditors; and the assignees may proceed by action of debt for the recovery of such rents and profits, or may distrain for the same upon the lands subject to the payment thereof, and in case any action of trespass shall be brought for taking any such distress may plead thereto the general issue, and give this act or other special matter in evidence, and also, in case any such distress shall be replevied, shall have power to avow or make cognizance generally in such manner and form as any landlord may now do by virtue of the statute made in the eleventh year of the reign of his Majesty King George the Second, intituled, "An Act for the more effectual securing the Payment of Rents and preventing Frauds by tenants," or by any other law or statute now in force or hereafter to be made for the more effectually recovering of rent in arrear; and such assignees and their bailiffs, agents, and servants, shall also have all such and the same remedies, powers, privileges, and advantages of pleading, avowing, and making cognizance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof, as landlords, their bailiffs, agents, and servants, are now or hereafter may be by law entitled to have when rent is in arrear; and such assignees shall also have the same power and authority of enforcing the observance of all covenants, conditions, and agreements in respect of the lands of which such commissioner as aforesaid hath the power of disposition under this act, and in respect of the rents and profits thereof, and of entry into and upon the same lands, for the non-observance of any such covenant, condition and agreement, and of expelling and removing therefrom the tenants or other occupiers thereof, and thereby determining and putting an end to the estate of the persons who shall not have observed such covenants, conditions and agreements as the bankrupt would have had

as if entitled to the reversion. This clause to apply to all copyhold lands; but as to other lands only to such as the commissioner may dispose of after the bankrupt's death.

11 Geo. 2, c. 19.

in case he had not been adjudged a bankrupt : Provided always, that this clause shall apply to all lands held, by copy of court roll, but shall only apply to those lands of any other tenure which any commissioner acting in the execution of any such fiat as aforesaid may have power to dispose of under this act after the bankrupt's decease.

Previous Clauses as to Bankrupts to apply to Ireland.

All the provisions of the act in regard to bankrupts shall apply to their lands in Ireland.

LXVIII. And be it further enacted, that all the provisions in this act contained for the benefit of the creditors of persons who under such fiats as aforesaid shall be adjudged bankrupts after the thirty-first day of December one thousand eight hundred and thirty-three, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in Ireland of such persons as fully and effectually as if this act had throughout extended to lands of any tenure in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland. (g)

Provisions of the Irish act as to bankrupts apply to their lands in England.

(g) The 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, and 59 sections of the 4 & 5 Will. 4, c. 92, as to bankrupt's lands in Ireland, with the omission of copyholds, agree in substance and effect with the 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, and 67 sections of 3 & 4 Will. 4, c. 74. By the 4 & 5 Will. 4, c. 92, s. 60, it is enacted, that all the provisions in that act contained for the benefit of the creditors of persons who, under such commissions as aforesaid, (i. e. *issued under Irish stat. 11 & 12 Geo. 3, c. 8.*) shall be adjudged bankrupts after the 31st October, 1834, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in England of such persons, as fully and effectually as if the act had throughout extended to land of any tenure in England.

Enrolment of Deeds in Ireland.

Deeds relating to the lands of bank-

LXIX. Provided always, and be it further enacted, that in all cases of bankruptcy, every

deed of disposition under this act of lands in Ireland by any commissioner acting in the execution of any such fiat as aforesaid, and also every deed by which the protector of a settlement of lands in Ireland shall consent, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in England (r)

rupts in Ireland to be inrolled in the court of Chancery there.

(r) The 61st section of the Irish stat. 4 & 5 Will. 4, c. 92, provides that in all cases of bankruptcy, every deed of disposition under that act of lands in England, by any commissioner acting in the execution of any such commission as aforesaid, and also every deed by which the protector of a settlement of lands in England shall consent, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland.

Deeds relating to bankrupts' lands in England to be inrolled in court of Chancery there.

MONEY TO BE LAID OUT IN LANDS TO BE ENTAILED.

Repeal of Stat. 7 Geo. 4, c. 45.

LXX. And be it further enacted, that after the thirty-first day of December one thousand eight hundred and thirty three, an act passed in the seventh year of the reign of his late Majesty King George the Fourth, intituled "An Act for repealing an Act passed in the Thirty-ninth and Fortieth Years of the Reign of his late Majesty King George the Third, intituled 'An Act for the Relief of Persons entitled to entailed Estates to be purchased with Trust Monies,' and for making further Provisions in Lieu thereof," shall be and the same is hereby repealed, except as to such proceedings under the act hereby repealed as shall have been commenced before the first day of January one thousand eight hundred and thirty-four, and which may be continued under the authority and according to the provisions of the act hereby repealed: Provided always, that the act so repealed by the said act of the seventh year of

Repeal of the statute 7 G. 4, c. 45, except as to proceedings commenced before 1st Jan. 1834.

30 & 40 G. 3, c. 56, not to be revived.

the reign of his late Majesty King George the Fourth shall not be revived. (s)

Old mode of
barring es-
tates tail in
entailed
money.

(s) Money directed to be laid out in the purchase of land is considered by a court of equity as converted into real estate. Formerly a person who would have been entitled to the land, if purchased, as tenant in tail, was enabled by a court of equity to receive the money if he could have acquired the fee by fine, but not if a recovery would have been requisite, in which case it was necessary to purchase land in order to suffer a recovery. This inconvenience was removed by the two acts mentioned in this section, which provided that in all cases where money under the control of any court of equity, or of which trustees were possessed, should be subject to be invested in the purchase of freehold or copyhold lands, to be settled in such manner that it would be competent for the persons who would be the tenants in tail of any estate therein, either alone or with the owners of any particular preceding estates therein, to bar such estates tail and remainders, it should not be necessary to have such money actually invested in lands, but a court of equity, on the petition of the person who would be tenant of such estates tail, and the party having any antecedent estates (being adults, or femes covert separately examined) might order such money to be paid to them, or applied as they should appoint. The order under the act, if made in vacation, was to take effect only in case the party should be living on the second day of the ensuing term. (5 Ves. 12, 6 Ves. 116.) The order would not have been made in term unless there were time to suffer a recovery, (8 Ves. 609;) nor in any case, without a reference to the master to inquire whether the parties had incumbered their interests in the money. (6 Ves. 576.) But where the fund was subject to charges, the court would order it to be transferred to the tenant in tail, after providing for such charges. (*In re Lord Somerville*, 2 Sim. & Stu. 470. See other cases which arose under the 7 Geo. 4, c. 45, in 3 Russ. 369, 416; 5 Russ. 5.) The Irish stat. 4 & 5 Will. 4, c. 92, s. 62, repealed the Irish stat. 58 Geo. 3, c. 46, and 7 Geo. 4, c. 45, after the 31st October, 1834, except as to proceedings commenced before 1st November, 1834.

Mode of Disposition of entailed Money.

The previous clauses, with certain variations, to apply to lands of any tenure to be sold, where the purchase-money is sub-

LXXI. And be it further enacted, that lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate

tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall for all the purposes of this act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in this act, so far as circumstances will admit, shall, in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled; and shall, in the case of the lands to be sold as aforesaid being held by copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and shall in the case of money subject to be invested in the purchase of land to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in case of bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed, which shall have no operation under this act unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and in every case of bank-

ject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner.

ruptcy the disposition of such leasehold lands or money shall be made by the commissioner, and completed by inrolment in the same manner as hereinbefore required in regard to lands not held by copy of court roll. (t)

Object of last section.

(t) The object of this section is to make the substitute for fines and recoveries applicable to money to be laid out in land to be entailed, and to allow it to be unfettered by the same process as the land itself would be if purchased. When by means of the substitute the money is discharged from the entail and remainder, or, as may sometimes happen, from an entail only, the trustees will, if the money should be discharged from all interests and charges subsequent to the entail, and there should be none such subsisting, either upon the interest in tail, or prior thereto, pay it over immediately to the person barring the entail, and will, if there should be any interests and charges still subsisting, hold it in trust for the person barring the entail, and the persons entitled to such interests and charges. If the money should be in court, it may be paid upon application to the court, on producing evidence that the person barring the entail is entitled to receive it. (See 1 *Real Property Rep.* 36.) An order was made for payment out of court of a sum of stock, of which the petitioner was *quasi* tenant in tail in possession under a settlement, on his producing the deed inrolled, or an affidavit of the inrolment of the deed, whereby, in pursuance of the provision of 3 & 4 Will. 4, c. 74, s. 71, he had barred the estate tail and remainder over in the stock in question. (*In re Smythe*, 3 M. & Keen, 249.)

Entailed Money—Ireland.

Lands of any tenure in Ireland, to be sold, where the purchase money is subject to be invested in the purchase of lands to be entailed, and money under the control of a court of equity in Ireland, subject to be invested in like manner, to be subject to

LXXII. And be it further enacted, that so far as regards any person adjudged a bankrupt under any such fiat as aforesaid, the provisions of the clause lastly hereinbefore contained shall, for the benefit of the creditors of the bankrupt, apply to lands in Ireland to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of any court of equity in Ireland, or of or to which any individuals as trus-

tees may be possessed or entitled in Ireland, and which shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, as fully and effectually as if this act had throughout extended to Ireland: provided always, that every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to lands in Ireland to be so sold as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof; but every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to money subject to be invested in the purchase of lands to be so settled as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland: (u) saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland to be sold.

this act in cases of bankruptcy.

(u) This saving is not in the corresponding section in the Irish stat. 4 & 5 Will. 4, c. 92, s. 64.

THE INROLMENT OF DEEDS, &c.

LXXIII. And be it further enacted, that any rule or practice requiring deeds to be acknowledged before the inrolment shall not apply to any deed by this act required to be inrolled in his Majesty's High Court of Chancery in England or Ireland. (x)

As to deeds being acknowledged before inrolment.

(x) By the Irish act 4 & 5 Will. 4, c. 92, s. 73, it is provided that any rule or practice requiring deeds to be acknowledged before inrolment, shall not apply to any deed by that act required to be inrolled in the Court of Chancery in Ireland.

Relation back of inrolled Deeds.

Every deed to be inrolled by which lands or money shall be disposed of under this act, to take effect as if inrolment not required.

LXXIV. And be it further enacted, that every deed required to be inrolled in his Majesty's High Court of Chancery in England or Ireland, by which lands or money subject to be invested in the purchase of lands, shall be disposed of under this act, shall, when inrolled as required by this act, operate and take effect in the same manner as it would have done if the inrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly inrolled under this act, if such subsequent deed shall be first inrolled. (y)

(y) This clause of the act will render it necessary for purchasers and mortgagees to have the deed under which they take inrolled without any delay, and it will be proper for them to ascertain, by search at the inrolment office, that no conveyance prior to that under which they claim, made by the tenant in tail, has been inrolled. A bargain and sale, when acknowledged and inrolled, has relation to the time of execution, and if the grantee dies within six months, and afterwards it is acknowledged and inrolled, it is good, because it is a collateral act required by act of parliament, and not arising from the nature of the instrument itself. (2 Ves. sen. 79. See Com. Dig. Bargain and Sale (B. 9).)

Fees on Inrolment of Deeds.

The Court of Chancery to regulate the fees to be paid for the inrolment of deeds, &c.

LXXV. And be it further enacted, that it shall be lawful for his Majesty's High Court of Chancery in England, as to deeds to be inrolled in England under this act, and for his Majesty's High Court of Chancery in Ireland, as to deeds to be inrolled in Ireland under this act, from time to time to make such orders as the court shall think fit touching the amount of the fees and charges to be paid for the inrolment of such deeds, (z) and to be paid for searches for such deeds in the office of inrolments, and to be paid

for copies of the inrolment of deeds under this act, where such copies are examined with the inrolments, and signed by the proper officer having the custody of such inrolments.

(s) It is understood that no order has been made as to the fees; the charge now made for inrolling deeds in Chancery is about 1s. per folio.

LXXVI. And be it further enacted, that it shall be lawful for his Majesty's Court of Common Pleas at Westminster from time to time to make such orders as the court shall think fit touching the amount of the fees and charges to be paid for the entries of deeds by this act required to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of lands held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders by which dispositions shall be made under this act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders or the memorandums thereof on the court rolls.

The Court of Common Pleas to regulate the fees for entries on court rolls and indorsements on deeds, and for taking consents, &c.

ALIENATION BY MARRIED WOMEN.

General enabling Clause.

LXXVII. And be it further enacted, that after the thirty-first day of December one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act, (a) by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release,* surrender or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be

A married woman, with her husband's concurrence, to dispose of lands and money subject to be invested in the purchase of lands, and of any estate therein; and to release and extinguish powers, as a feme sole.

* The Irish stat. 4 & 5 W. 4, c. 92, s. 68, contains the word "disclaim."

Not to extend
to copyholds
in certain
cases.

vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: (b) Provided always, that this act shall not extend to lands held by copy of court roll of or to which a married woman, or she and her husband in her right, may be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel. (c)

(a) See section 40, *ante*, p. 329.

(b) Section 79, *post*, p. 378.

Right of
dower in-
cluded in this
section.

(c) Soon after the passing of this act doubts were raised whether under this clause a married woman could extinguish her right of dower. The question could apply only to women who were married before the 1st January, 1834, and whose rights of dower are saved by stat. 3 & 4 Will. 4, c. 105, s. 14. The first section of the act, *ante*, p. 270, declares that "the word *estate* shall extend to any interest, charge, lien, or incumbrance, in, upon, or affecting land, either at law or in equity;" which in practice has been thought sufficient to include the right of dower; and if another construction should prevail it will be necessary to amend the act, as there is now no other mode of barring the right of dower of a woman married before the 1st January, 1834. Lord Coke states, Co. Litt. 346 b, that the word "*interest* is vulgarly taken for a term or chattel real, and more particularly for a future term, in which case it is said in pleading, that he is possessed *de interesse termini*. But *ex vi termini*, in legal understanding it extendeth to estates, rights, and titles, that a man hath, of, in, to, or out of lands, for he is truly said to have an interest in them, and by the grant of *totum interesse suum* in such lands, as well reversions as possessions in fee simple shall pass. And all these words, *i. e.* *estate*, *right*, *title*, and *interest*, singularly spoken, are *nomina collectiva*, for by a grant of *totum statum suum* in lands all his estates therein pass, *et sic de similibus*."

Sir E. Sugden observes (2 V. & P. 308, 10th ed.) the Dower Act (3 & 4 Will. 4, c. 105) does not prevent a married woman, with the concurrence of her husband, from barring her dower; but this statute has abolished the only modes by which that could have been accomplished. In framing the present section, the right of dower is not scientifically provided for, but the intention is obvious, and the married woman is empowered to extinguish any estate which she has in the lands; and the word "estate" is, by the first section, extended to any interest in lands, and a power, therefore, does appear to be given to married women and their husbands to bar dower.

It seems that a doubt has been entertained whether a married woman, by a deed acknowledged according to this act, can *disclaim*; an opinion in the affirmative has been expressed by the editor of the last edition of Cruise's Digest, (7 vol. p. 13, 4 vol. p. 19, n.) on the ground that although there might not be words in the clause which technically and strictly apply to the interest of the *feme covert* trustee, which, until the trust is accepted, is a potential rather than an actual "estate;" yet that it would be in entire accordance with the spirit and intent of the act, to construe a disclaimer within the operation of the clause, as the act is intended to substitute assurances for fines and recoveries; and before the act a *feme covert* trustee might have disclaimed by fine. And by the first section of the act it is declared that the word *estate* shall extend to "any interest in, upon, or affecting lands, either at law or in equity." If the doctrine of Lord Eldon, in *Nicholson v. Wordsworth*, 2 Swanst. 368—372, that there is no distinction between a formal disclaimer and a release with an intent to disclaim, be followed, the doubt which has been suggested may be obviated by taking such a release. The Irish statute 4 & 5 Will. 4, c. 92, s. 68, contains the additional word *disclaim*, after the words "dispose of."

Disclaimer.

The old doctrine was, that an estate of freehold could be disclaimed only by matter of record. (*Butler and Baker's case*, 3 Rep. 26.) But it is established by modern authorities that a deed is sufficient for that purpose. Although a devise being *prima facie* for the devisee's benefit, is supposed to be accepted by him until he does some act to show his dissent, yet he may by deed under his hand and seal, without matter of record, renounce the estate, and make it as to him null and void. (*Townson v. Tickell*, 3 B. & Ald. 31.) This case has been followed in a case where a deed of disclaimer by a devisee in trust of freehold and copyhold property was held to vest the entire legal estate in his co-trustees. (*Begbie v. Crook*, 2 Bing. N. C. 70; 2 Scott, 128; and see observations on *Townson v. Tickell*, in 4 M. & R. 189, and in 2 Scott, 130.)

It is most prudent that a deed of disclaimer should be executed by a person named trustee, who refuses to accept the trust, because such deed is clear evidence of the disclaimer,

and admits of no ambiguity; but there may be conduct which amounts to a clear disclaimer. As where a person named as executor and trustee under a will did not formally renounce probate until after the death of the acting executrix, nor did he ever disclaim by deed the trust of the real estate; but he purchased a part of the real estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended upon the disclaimer of the trust. During the life of the acting executrix, however, he interfered in the disposition of the testator's property, as her friend or agent; it was held, that he was not under the circumstances chargeable as executor or trustee. (*Stacey v. Elph*, 1 Mylne & Keen, 195.)

An interest devised vests in the devisee by presumption of law before entry. (Co. Litt. 111, a.) Where the devisee of an estate refused to take it, saying she was entitled, as heir at law, and would not accept any benefit by the will of the deviser, it was held that this was not such a disclaimer as prevented her from afterwards bringing an ejectment on her title as devisee. (*Doe d. Smyth v. Smyth*, 6 B. & C. 112; S. C. 9 D. & R. 136.) In the last case it was said by the court not to be necessary to decide whether the renunciation and disclaimer may be by parol; because in whatever form they are made, a disclaimer of an estate in land must be clear and unequivocal. (Id. 117.) It seems that a devise of copyholds may be disclaimed by word of mouth only before the devisee has been admitted. (*Rez v. Wilson*, 10 B. & C. 5; 1 M. & R. 140; see Shepp. Touch. 452.) A gift of personal chattels, as well as a lease for a term of years, may be waived and avoided by parol. (1 Ventr. 128.) On a disclaimer by a devisee the estate will descend to the heir, or pass to a remainder-man. (Id. 116.) And on the disclaimer of one of two assignees of a term, the whole interest will vest in the other. (*Smith v. Wheeler*, 1 Vent. 128; 2 Keb. 772.)

In *Crewe v. Dickinson*, 4 Ves. 97, one of two trustees released and conveyed to his co-trustee, and he having sold, the trustee who had released refused to join in the receipt for the purchase money; and it was held that the trustee must be considered as having accepted the trust, he having conveyed and released to his co-trustee, and that the purchaser was not bound to accept the title. With reference to the last case, Lord Eldon said, (2 Swanst. 370,) "If the essence of the act is disclaimer, and if the point were *res integra*, I should be inclined to say, that if the mere fact of disclaimer is to remove all difficulties, and vest the estate in the other trustees, a party who releases, and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee. The answer, that the release amounts to more than a disclaimer, is much more technical than any reasoning that deserves to prevail in a court of equity." And his lordship expressed an opinion, that if a person who is appointed co-

trustee by any instrument, executes no other act than a conveyance to his co-trustees, where the meaning and intent of that conveyance is disclaimer, the distinction is not sufficiently broad to act upon. (*Nicolson v. Wordsworth*, 2 Swanst. 371.) But a trustee of real estate, who disclaimed all estate, powers, &c. in the estate devised, was held not to be a necessary party in a conveyance to a purchaser, nor in a receipt for the purchase money. (*Adams v. Taunton*, 5 Mad. 433. See, in addition to the cases cited, Litt. s. 684, 685; stat. 21 Hen. 8, c. 4; Co. Litt. 113, a; *Bentley v. Greenfield*, Cro. Eliz. 80; Godb. 77; *Anon.* 4 Leon. 207; *Hawkins v. Kemp*, 3 East, 410; *Thomson v. Leach*, 2 Vent. 198; Carth. 211, 230; 2 Selk. 616; Show. P. C. 161; 3 Lev. 284; 1 Show. 296; Rep. temp. Holt, 666.) Trustees who declined to act have been directed to convey by the Court of Chancery. (*Attorney-General v. Doyley*, 2 Eq. Cas. Abr. 194; *Hussey v. Markham*, R. temp. Finch, 258.) In these cases the trustees were discharged from the trusts by force of the decree, and therefore an acceptance could not be inferred from the form of the instrument. In *Sharp v. Sharp*, 2 B. & Ald. 405, it was held that trustees had not acted, though they had conveyed the estate instead of disclaiming.

A feme covert made a disposition of property, as to which it was doubtful whether it was settled to her separate use. The husband disclaimed; it was held that, whether separate property or not, the husband's disclaimer gave effect to the disposition of the wife. (*Rymer v. Christy*, 3 Beav. 238.)

Powers are either appendant or in gross, or altogether collateral; appendant, when the exercise of them is in the first instance to interfere with, and, to a certain extent, to supersede the estate of the donee of such power; in gross, when they do not commence until the determination of the estate of the donee; and collateral, when the donee has no estate at all in the property, which is the subject of the power. A power reserved to a tenant for life to make leases in possession is appendant; for, by the exercise of it, the term created by it necessarily precedes the estate of the tenant for life, to whom it is reserved. A power to a tenant for life to jointure is a power in gross; for the jointure created by it must necessarily take effect after the death of the particular tenant. Where an estate is limited to the use of A. for life, with remainders over to other persons, and with a power of revocation and new appointment reserved to A., this power is both appendant and collateral. It is appendant as to the estate for life of A., and collateral as to the estates in remainder. A power wholly collateral is reserved to a stranger, having no legal estate in the property settled. As where an estate is limited in strict settlement, and a power is reserved to a stranger to revoke the existing uses, and limit new ones. (1 Sand. on Uses, p. 169, 170, 4th ed.)

In *Albany's case*, 1 Rep. 111, it was held that the reserved

Different kinds of powers.

Destruction of powers.

power of the grantor, who took an estate for life under the settlement, might be extinguished by his release. In *Digges's case*, 1 Rep. 173, it was held that the reserved power of the grantor, who took by the deed also an estate for life, being to be executed by deed indented and inrolled, was extinguished by his fine, levied after a revocation, but before inrolment. In *Leigh v. Winter*, Sir W. Jones, 411, it was held that the grantor who took by the settlement an estate for life could release his reserved power of revocation. In *Bird v. Christopher*, Style, 389, it was held that if A. enfeoff with power of revocation, and afterwards levy a fine, the power is extinguished. In *King v. Melling*, 1 Vent. 225, it was held that a power in the devisee for life to jointure his wife was extinguished by a recovery. In *Tomlinson v. Dighton*, 1 P. Wms. 149, it seems to be admitted that where there is a devisee for life, with power to appoint to her children, the power would be extinguished by fine. In *Saville v. Blacket*, 1 P. Wms. 777, it was held that a tenant for ninety-nine years, if he should so long live, extinguished his power to charge the estate with a sum of money, by joining in a recovery and resettlement of the estate, because he would otherwise defeat his own grant.

Where a tenant for life, having a power to charge the estate after his death for the benefit of his children, levied a fine, the power was held to be extinguished. Thus where by a marriage settlement lands were limited to the use of the husband for life, remainder to the wife for life, remainder to trustees for a term of 400 years, to commence from the decease of the survivor of the husband and wife, remainder to the heirs of the body of the wife begotten by the husband, remainder to the heirs of the husband. The trust of the term was, in case there should be issue of the marriage a son, and one or more younger child or children, who should live to attain his, her, or their age or ages of twenty-one years, to raise such sum, not exceeding 200*l.* in the whole, as the husband and wife should, by any deed or writing, or his or her last will and testament, appoint; and in default of such appointment, or subject thereto, after the monies so appointed should have been raised, and the costs of the trustees paid, the term was to cease, or be assigned to attend the inheritance. There were younger children of the marriage, who attained twenty-one. The wife died, without having joined in any appointment, and afterwards the husband levied a fine of the premises; and it was held that the power was extinguished. (*Bickley v. Guest*, 1 Russ. & Mylne, 440.)

So where an estate was devised to A. for life, remainder to such of his children surviving him as he should by deed or will appoint, with remainder to the use of the first son of A. in tail, with remainders over, and the son joined with his father in suffering a recovery, it was held that the power was destroyed. (*Smith v. Death*, 5 Madd. 371; and see *Jesson v.*

Wright, 2 Bligh, 15,) where Lord Redesdale said, "How can a man, having a power for the benefit of children, destroy it?" Lord Hale, in *Edwards v. Slater*, Hardres, 410, seemed to be of opinion that where the party to execute the power has or had an estate in the land, it is not simply collateral; and whether it be appendant to his estate, as a leasing power, or unconnected with his particular estate, and therefore in gross, might be destroyed by release, fine, or feoffment. In *West v. Berney*, 1 Russ. & Mylne, 435, Sir J. Leach, M. R., expressed an opinion, "that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore in gross, may be extinguished. In respect of his freehold interest, he can act upon the estate; and his dealing with the estate, so as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross, in tenant for life, would not be defeated by a conveyance of his life estate, as a power appendant or leasing power would be defeated; because his conveyance of the life estate is not inconsistent with the exercise of his power." It was determined by Lord Mansfield (*Rea v. Hall v. Bulkeley*, 1 Dougl. 292), that if a tenant for life, with power to grant leases when in possession for twenty-one years, to take effect in possession and not in reversion, reserving the best rent, &c., convey his life estate to trustees to pay an annuity for his life, and the surplus to himself, the power is not thereby extinguished; but he may still grant leases, agreeably to the terms of the power. So where there was a power in a strict settlement, enabling three successive tenants for life, "respectively when, and as they shall respectively be, in the actual possession of the said lands," &c. by virtue of the limitations of the settlement, and not before, to make leases, &c. for lives or years. The second tenant for life conveyed his life estate to three persons, in trust to secure to them an annuity during his life, and subject thereto to pay the surplus rents to him,—the conveyance containing a covenant on the part of the grantees, that in case the then lease should expire during the life of the grantor, it should be lawful for him to let the premises as he should think proper, with their consent, provided a rent not less than the existing rent should be reserved. The old lease having expired, the second tenant for life, with the consent of the grantees, made a new lease. Under these circumstances, it was held that the power was not inseparably annexed to the estate for life; and though it might not be competent for the tenant for life to derogate from his own act, still he had here expressly reserved an authority to let; and that the new lease being conformable both to the power and the covenant, was good. *Abbott, C. J.*, said, "We ought not to hold that such a power is extinguished by

a transfer of the estate, unless we see clearly in the language of the deed, whereby the power is created, that the donor of the power intended inseparably to annex it to the life estate given, and to a continuance of that estate in the identical person to whom it is given." The words "and not before" were much relied on to show that the clause pointed out only the order in which the successive tenants for life were to execute. (*Long v. Rankin*, App. Sugd. on Powers, 676, 4th ed.; 2 Chance on Powers, 699, 600.)

A power *simply collateral*, that is, a power to a stranger who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land. It is clear, too, it cannot be released, where it is to be exercised for the benefit of another, as in the case of a power to executors to sell lands. (Co. Litt. 265 b; 11 Rep. 111 a.) But where the power is for the benefit of the party, as a power to charge a sum of money for himself, it may be released; and in such a case his joining in a conveyance of the land, clear of the charge, would be a release. (*West v. Berney*, 1 Russ. & Mylne, 434, 435.)

An authority to *consent* to the exercise of a power of sale appears to be subject to the same rules, with reference to extinguishment and suspension, as an authority to execute a power. (*Earl and Countess of Jersey v. Deane*, 5 B. & Ald. 569; 10 Moore, 311; *Roper v. Halifax*, 8 Taunt. 845.) A general power of appointment given to husband and wife, during their joint lives, was held not to be destroyed by a conveyance by the husband under the Insolvent Act to the provisional assignee. (*Jones v. Winwood*, 3 Mee. & W. 653; 10 Sim. 150.) In these cases the court dissented from the decision of Sir J. Leach, M. R., in *Badham v. Mee*, 7 Bing. 695; 1 M. & Scott, 14; 1 M. & Keen, 32.

By a marriage settlement of the husband's lands, after a life estate limited to the husband, &c., a joint power was reserved to the husband and to his wife to appoint the estate in favour of children; with a contingent limitation to the children (which in the events which happened could not take effect) and the reversion in fee to the husband. It was held that the bankruptcy of the husband prevented a subsequent exercise of the joint power *to the prejudice of the assignees*. (*Hole v. Scott*, 2 Keen, 444; 4 My. & Cr. 187; see *Thorpe v. Goodall*, 17 Ves. 388; 1 Rose, 40, 270.) By 6 Geo. 4, c. 16, s. 77, the assignees of a bankrupt are enabled to exercise for the benefit of the creditors all powers vested in a bankrupt, which he might execute for his own benefit (except the right of nomination to a vacant ecclesiastical benefice).

Saving of other Powers.

LXXVIII. Provided always, and be it further enacted, that the powers of disposition given to a married woman by this act shall not interfere with any power which, independently of this act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition. (d)

The powers of disposition given to a married woman by this act not to interfere with any other powers.

(d) In the corresponding clause in the Irish stat. 4 & 5 Will. 4, c. 92, s. 69, the following qualification is added, "but such powers of disposition shall not enable a married woman to dispose of lands, or any estate therein, where the settlement or other instrument under which she may be entitled to the same, shall contain a valid restriction against the anticipation thereof by such married woman."

Powers of alienation by married women.

Where an act of parliament authorizes the purchase of lands in which a *feme covert* is interested and gives the Court of Exchequer authority to distribute the purchase money amongst the parties beneficially entitled thereto, the exercise of that authority by the court is in lieu of the solemnities ordinarily required for the conveyance of the real property of a *feme covert*, or on payment of her money out of court. (*Ex parte Ellison in re Trinity House Corporation Act*, 2 Y. & Coll. 528.)

Solemnities dispensed with by act of parliament.

The disabilities of married women at common law, independent of particular customs, to alien their property, whether real or personal, either by deeds or wills, are well known. (See *Harg. Co. Litt.* 111 b, n. (4).) The wife of a man who has abjured the realm, or been transported, may act as if her husband were dead. (*Co. Litt.* 132; 2 *Vern.* 104; 3 *P. Wms.* 37.) Through the medium of powers and trusts, however, a married woman has long been allowed to have, both at law and in equity, the full dominion over property independent of her husband. A wife may, without her husband, execute a naked authority, as to sell lands whether given before or after coverture, and though no special words are used to dispense with the disability of coverture. (*Co. Litt.* 112 a, and n. (6).) The rule is the same where both an interest and an authority pass to the wife, if the authority is collateral to and does not flow from the interest; because then the two are unconnected, as if they were vested in different persons. (*Rep. temp. Finch*, 346.) As too a *feme covert* may without her husband convey lands in execution of a mere power or authority, so she may with equal effect in performance of a condition, where land is vested in her on condition to convey to others. (*W. Jones*, 137, 138.) The reason why in these instances the wife may convey without her

husband, seems to be, that he can receive no prejudice from her acts, but a great one might arise to others if his concurrence should be essential. (Harg. Co. Litt. 112 a, n. (6).) The same reasoning has been urged in favour of the power of a married woman to convey an estate of freehold vested in her as a trustee; but as the law takes no notice of trusts, the better opinion, sanctioned by uniform practice, is, that as to estates of freehold which a married woman has as trustee, no effectual conveyance could formerly be made by her without fine or recovery, nor now without a deed duly acknowledged. (See 1 Prest. on Abs. 337.)

By the custom of London, confirmed by stat. 34 & 35 Hen. 8, c. 22, and of several other cities and boroughs, as Norwich, &c. &c. a married woman, on being privately examined before the mayor, may bind herself by a deed acknowledged and inrolled, (Hob. 225; Com. Dig. London, (N. 3.)) according to the custom of the city or borough. (2 Inst. 673; 1 Prest. Abst. 336; Roper on Husband and Wife, 531; 4 Cruise's Dig. tit. 32, ch. 2, pl. 33.) By stat. 32 Hen. 8, c. 28, the husband and wife may together, under certain restrictions, make leases of the wife's lands for three lives or twenty-one years. If the requisites of the statute be not complied with, the lease is only voidable, not actually void; and by her receipt of rent after her husband's death the lease will be confirmed. (*Doe v. Weller*, 7 T. R. 478.) By stat. 11 Geo. 4 & 1 Will. 4, c. 65, s. 12, (repealing 29 Geo. 2, c. 31,) a married woman entitled to any lease or leases for life or lives, or for any term of years, either absolute or determinable upon the death of one or more person or persons, may apply to a court of equity by petition or motion, and by the order of such court may by deed only surrender such lease or leases, and accept and take for her own benefit a new lease or leases, during such number of lives, determinable upon lives, or for such number of years as were mentioned in the lease or leases surrendered at the making thereof respectively, or otherwise, as those courts should direct. This act was extended to Ireland by 5 & 6 Will. 4, c. 17. Before 29 Geo. 2, c. 31, married women could not surrender leases without a fine. (*Price v. Butts*, 2 Roll. 168.) A deed acknowledged under this act being less expensive than an application to a court of equity, will probably be now adopted.

It has long been firmly settled, that a married woman may execute a power whether appendant, in gross, or simply collateral, (*Harris v. Graham*, 1 Roll. Abr. 329, pl. 12; 2 Roll. Abr. 247, pl. 6; *Gibbons v. Moulton*, Finch, 346; *Daniel v. Upley*, Latch. 39; Godb. 327, pl. 419; *Tomlinson v. Dighton*, 1 P. Wms. 149; *Travel v. Travel*, 3 Atk. 711, cited 2 Ves. sen. 191,) as well over a copyhold as a freehold estate, (*Driver v. Thompson*, 4 Taunt. 294.) Thus if a married woman is tenant for life, with a power of leasing in possession, she could not heretofore create a mortgage term without a fine or recovery, nor now without a deed acknowledged according

to the above statute 3 & 4 Will. 4, c. 74, but by the mere execution of her power she may make a lease, which will at least in part, and may perhaps wholly take effect out of her interest. So if she has a general power of appointment, with remainder, in default of appointment, to herself in fee, she could not by the old law affect the remainder vested in her, except by a fine or recovery, nor under this act without a deed acknowledged; but she may defeat the remainder, and convey away the estate by the execution of her power.

A power of disposing of real estate may be given to a married woman, either by way of trust or of power over an use. In the first instance, suppose a woman having a real estate before marriage, and either before or after marriage by a proper conveyance conveys such estate to trustees in trust for herself during her coverture for her separate use; and afterwards that it shall be in trust for such person as she shall by any writing under her hand and seal or by will appoint, and in default of appointment to her heirs, and after marriage she makes an appointment in pursuance of the power, it will be a good declaration of trust, and would defeat the right of her heir at law. (2 Ves. sen. 191.) A power is a mode which the owner of an estate reserves to himself or gives to another, through the medium of the statute of uses, of raising and passing an estate. (10 Ves. 266.) The right of disposing of an estate may be reserved to a married woman by way of power over an use, as where an estate is conveyed to the use of herself for life, remainder to the use of such persons as she shall appoint, and in default of appointment, to her own right heirs, by the execution of such power, she alone can dispose of the remainder in exclusion of her heirs. (2 Ves. sen. 191.)

In what way powers may be reserved to married women.

A power coupled with an interest given to a single woman to be executed by her, *being sole*, cannot be exercised during marriage, (*Marquis of Antrim v. Duke of Buckingham*, 1 Ch. Cas. 17; 8. C. 1 Eq. Abr. 343, pl. 4.) And where there is an express dispensation with coverture, powers coupled with an interest may be exercised notwithstanding coverture; but it does not appear to be decided that where there is no dispensation with coverture that such powers can be executed, although the prevailing opinion is that they can. (Sugd. on Powers, 150; Harg. Co. Litt. 112 a, n. (b); 1 Prest. on Abs. 338; Watk. Conv. by Cov. 390, n. (a).)

A power resting on articles only made before marriage will enable the wife to dispose of property. By articles before marriage, the intended husband covenanted that he would execute all such acts and conveyances as should be necessary for vesting any estate which might descend to his wife, in such persons as she should name, in trust for her sole and separate use; and to be subject to such disposition as she should make thereof, by any deed or writing under her hand and seal, or by her last will and testament. The wife having become entitled to a trust estate in some lands devised them by her will. And it was decreed that the power was well created and exe-

outed. (*Wright v. Cadogan*, 1 Br. P. C. 486; *Ambl.* 468; 2 *Edm.* 239; see *Doe v. Staple*, 2 T. R. 684.) But a mere contract by the wife to convey, entered into after marriage, whether for her own benefit or that of others, would be void. (*Dillon v. Grace*, 2 Sch. & Lef. 462; *Worrall v. Jacob*, 3 Mer. 256.)

Condition
restraining
alienation.

A condition in a feoffment or grant not to alien to any person is void. (6 Rep. 41 b.) A grantee may be restrained from aliening for a particular time or to a particular person. (*Large's case*, 2 Leon. 82; 3 Leon. 183; *Muschamp's case*, Bridgm. 132.) So a devise in fee on condition that the devisees should not alien except to their sisters or their children is good. (*Doe v. Pearson*, 6 East. 172; *Cuthbert v. Purrier*, Jac. 417; *Ross v. Ross*, 1 Jac. & W. 158.)

Clauses
against anti-
cipation.

The old way of expressing a trust for a married woman was, that the trustees should pay into her proper hands, and upon her receipt only, and under such a trust she could dispose of her interest. When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a feme sole, as to possess all the incidents of property, and that she might therefore dispose of it as if sole, it was necessary, in order to protect her against the husband's rights, to qualify the gift by prohibiting anticipation. (*Pybus v. Smith*, 1 Ves. jun. 189; 3 Br. C. C. 340.)

The words, "not to be paid by anticipation" seem to have been first introduced by Lord Thurlow, who it is said did not attempt to take away any power the law gave her as incident to property, which being a creature of equity, she could not have at law; but as under the words of the settlement it would have been her's absolutely, so that she could alien, Lord Thurlow endeavoured to prevent that, by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation, reasoning thus—that equity making her the owner of it, and enabling her, as a married woman, to alien, might limit her power over it; but the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different. (See *Brandon v. Robinson*, 18 Ves. 434, 436.) Thus, under a trust to pay the dividends of a fund from time to time into the proper hands of a man, or on his proper order or receipt subscribed with his own hand, to the intent that the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof or any part thereof, and on his decease the principal to be paid to such persons as in a course of administration would become entitled to his personal estate, it was held that it was a life interest, liable to be assigned under a commission of bankruptcy; for, generally speaking, where property is given to a man for life, the donor cannot take away the incidents to a life estate, one of which is a power of disposition. (*Brandon v. Robinson*, 18 Ves. 429; 1 Rose, 197; see *Graves v. Dolphin*, 1 Sim. 66; 19 Ves. 66; and the cases cited 1 Swanst. 481, n.) So where trustees

under a will have a discretion as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of such *certain* *que* trust during his life, his interest passed to his assignees under the insolvent act, notwithstanding a proviso in the will, that he should not have power to sell, mortgage, or anticipate the income of the fund. (*Green v. Spicer*, 1 Russ. & M. 395; see *Lear v. Leggett*, Id. 690; S. C. 2 Sim. 479.) But where by the expressions used in a will it can be collected to have been the intention of the testator that the estate shall cease on bankruptcy, it will do so. As where there was no gift, but a direction that the payment should be made into the donee's proper hands, *but not to his assigns*, and for his own use and benefit, and there was a proviso that if the party should by any ways or means whatever sell, dispose of, or incur the right he had for life, then his interest to cease, and the trustees to apply it for the benefit of his children, it was held, that on the bankruptcy of the tenant for life his interest ceased, and that his children became entitled. (*Cooper v. Wyatt and others*, 5 Madd. 482.) In *Shes v. Hale*, (13 Ves. 404,) a gift for life with comprehensive words restraining the disposition of it, and giving it over in that event, was held to cease by the party's taking advantage of the insolvent act. (See *Wilkinson v. Wilkinson*, Coop. C. C. 259; 2 Wils. C. C. 47.)

The question as to the validity of a gift to the separate use of a married woman, and the clause against anticipation, was the subject of much discussion in the profession, after having been considered valid for a long period. The doubts upon this subject originated in an opinion which had been expressed, that the clause against anticipation could only be operative if the legatee was unmarried at the time when the gift took effect. (*Massey v. Parker*, 2 M. & Keen, 182; and see *Woodmeston v. Walker*, 2 Russ. & M. 197; *Brown v. Pecosk*, Id. 210.) It would exceed the limits assigned to these notes to go through all the cases on this subject, which are collected in 1 Hayes' Conv. 499—541.

It is now settled, that if property be given or settled to the separate use of a woman unmarried when the settlement or gift takes effect, and she be prohibited against anticipating it, it will, if not alienated by her when *discovert*, be enjoyed by her as her separate estate, during any coverture or covertures to which she may afterwards be subject; and she will, during the existence of such coverture or covertures, be unable to anticipate it. (*Tullett v. Armstrong*, 1 Beav. 1; affirmed, on appeal, by Lord Cottenham, 4 My. & Cr. 377.) In *Barton v. Briscoe*, (Jac. 603,) it was held that the restraint on anticipation continued in force only during the coverture, and therefore where, by a settlement made after marriage, the dividends of certain sums of stock were to be paid by trustees to the separate use of a married woman, but not so as to deprive herself of the benefit thereof by sale, mortgage, charge, or

otherwise in the way of anticipation, with remainder as she should appoint by will; and in default of appointment to A., the court after the death of the husband ordered the fund to be transferred upon the consent of the widow and her daughter, who was entitled in default of appointment. So a clause against anticipation, annexed to a life interest in a trust fund bequeathed to a female infant, does not prevent her, after she comes of age and before marriage, from effectually assigning her whole interest in the legacy. (*Brown v. Pocock*, 2 Russ. & Mylne, 210; S. C. 2 Mylne & Keen, 189. See *Massey v. Parker*, Id. 174.)

And where a testator directed that one-third of his residuary estate should be invested in the purchase of an annuity for the life of a female, who was single at the date of the will and the death of the testator, and this annuity he gave to her separate use, and independent of any husband she might happen to marry, and without power to sell or assign the same by anticipation; the Master of the Rolls, upon the ground that the restraint against alienation or anticipation, would be valid in case of future coverture, refused to order payment to the legatee of the price which would be paid for the annuity. But the Lord Chancellor (*Brougham*) held that she was so entitled, if she chose, to the fund at once, without having it laid out, and that this option was not affected by the clause against anticipation. (*Woodmeston v. Walker*, 2. Russ. & Mylne, 197. See *Newton v. Reid*, 4 Sim. 141.)

Power of disposition over separate estate.

Although the law acknowledges no separate estate in the wife, it is otherwise in a court of equity, where the wife is permitted to deal with such property as if she were a feme sole, not only as to strangers, but as to her husband. Therefore where in a deed executed, upon a separation between husband and wife, by them and by the trustees of their marriage settlement, the wife charged her separate property comprised in the settlement with the payment of an annuity to the husband, and the husband released his marital rights in respect of all future property acquired by the wife, it was held that the release by the husband was a good consideration for the grant of the annuity by the wife, and that the payment of it would be enforced by the court. (*Logan v. Birkett*, 1 Mylne & Keen, 220.)

Where a testator devised a freehold estate to trustees, in trust to pay the rents as the same should become due and payable into the hands of his wife, and not otherwise, for her life for her separate use, and directed that the receipts of his wife alone for what was actually paid into her own proper hands should be good discharges to his trustees, it was held that the wife had power to alienate her life estate; Sir J. Leach, V. C., observing, that it is too late to contend that a lady is restrained from the power of alienating her life interest, because it is given to her sole and separate use, and is to be paid into her own proper hands, and upon her receipt alone.

The contrary having been settled by repeated authorities, the construction given to the expressions in question was, that they were intended only to exclude the marital claims of any present or after-taken husband, and not to control that right of disposition which is incident to property. (*Acton and others v. White*, 1 Sim. & Stu. 429; see Sugd. Pow. 118, 119, 5th ed.) An annuity was assigned to trustees, in trust to pay the same to such persons as B. should, by any writing signed by her, notwithstanding her coverture, appoint, but so as not to deprive herself of the benefit thereof by sale or other anticipation, and for want of such appointment, in trust to pay the same to B. for her separate use: it was held that B. had not only a limited power of appointment, but also, under the latter part of the clause, the general uncontrolled dominion over the annuity. (*Barrymore v. Ellis*, 8 Sim. 1. See *Car v. Chamberlain*, 4 Ves. 631; *Roach v. Wadham*, 6 East, 289; *Wilde v. Fort*, 4 Taunt. 334.) A testator bequeathed certain property to trustees, upon trust from time to time during the life of S. B. (a married woman), to pay the clear rents, interests, and dividends, &c. unto such person or persons, for such intents and purposes, &c. as the said S. B. by any writing, &c. should appoint, but not by way of assignment or other anticipation; and in default of appointment, into her proper hands for her sole and separate use; the receipts of S. B. or her appointees to be good discharges to the trustees: it was held, that though S. B. had a limited power of appointment, yet, that by the general limitation to her in default of appointment, she had power to anticipate; and that the clause as to the receipts to the trustees was not sufficient to imply the restriction. (*Brown v. Bamford*, 6 Jurist, 451.)

It seems well established, that a settlement, gift, or limitation of personal property to the separate use of a woman, or in similar words, without any restraint on her alienation, enables her not only to receive and apply to her separate use the income but to dispose of the capital or corpus, either by an act *inter vivos*, or by will, (*Rich v. Cockell*, 9 Ves. 369; *Fettiplace v. Gorges*, 1 Ves. jun. 46; 3 Br. C. C. 8; see also *Peacock v. Monk*, 2 Ves. sen. 191; *Hearle v. Greenbank*, 3 Atk. 696; 1 Ves. sen. 298.) In *Burnaby v. Griffin*, (3 Ves. 266,) where an estate was devised to trustees and their heirs in trust to receive and pay over the rents and profits to A., a feme covert, for life for her separate use, with remainder to her daughters as tenants in common in tail, a conveyance of her equitable estate for life by *lease and release*, for making a tenant to the præcipe, was held valid. An opinion had prevailed, that where an estate in *fee simple* is conveyed for the separate use of a married woman, without an express power of appointment reserved to her, she cannot during her coverture dispose of the fee simple, without the concurrence of her husband, formerly in a fine or recovery, and now by a deed acknowledged. (See 1 Sand. Useh. 345, 4th ed.; Chance on Powers, pl. 545; *Goodill v.*

Brigham, 1 Bos. & P. 192.) That opinion has been confirmed by decisions. Thus where lands were devised to a trustee and his heirs, in trust for the separate use of a married woman, and to convey the same to her, her heirs, and assigns, free from the control of her present or any future husband, and to permit her to take the rents and profits; it was held that she had no power of devising the premises, for the legal estate was vested in the trustee for securing her against her husband's rights, with the beneficial interest in fee in her, without the incidental power of devising, and upon her death the trustee became seised for the heir at law, notwithstanding she had executed a will in favour of another person. (*Doe d. Stevens v. Scott*, 1 Moore & P. 317; 4 Bing. 506.) A married woman having real property settled to her separate use, with a testamentary power over it, may dispose of leaseholds and other chattels purchased with the produce of it, but not of real estate so purchased. (*Churchill v. Dublin*, 9 Sim. 447.) A husband and wife cannot effectually dispose of the life interest of the wife in a fund not settled to her separate use, beyond the duration of the coverture. (*Stiffe v. Everitt*, 1 M. & Craig, 37.) A feme covert, to whose sole and separate use a reversionary interest in personal property was given, may assign that interest as if she were a *feme sole*; and her assignment will bind her right in case she survive her husband. (*Keene v. Johnstone*, 1 Jones & Carey, Ir. R. 256.)

Acknowledgment of Deeds.

Every deed by a married woman, not executed by her as protector, to be acknowledged by her before a judge, &c.

LXXIX. And be it further enacted, that every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a master in chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereinafter provided.

Examination.

The judge, &c. before receiving such acknowledgment.

LXXX. And be it further enacted, that such judge, master in chancery, or commissioners as aforesaid, before he or they shall receive the ac-

knowledge by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and unless she freely and voluntarily consent to such deed, shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void. (e)

ment, to examine her apart from her husband.

(e) The statute *de modo levandi fines*, 18 Edw. 1, st. 4, directed a *feme covert*, when a party to a fine, to be first examined by four of the justices, and if she refused her assent to the fine it was not to be levied. (2 Inst. 515.) The wife was examined apart from her husband, in order that the judges or commissioners, taking her acknowledgment of a fine, might ascertain whether she joined voluntarily or by the compulsion of her husband, and the consequences of her assent were to be explained to her. But a fine levied without such examination bound a married woman and her heirs, there being no mode of reversing such a fine. (5 Cruise's Dig. 132, s. 91.)

Appointment of perpetual Commissioners.

LXXXI. And be it further enacted, that for the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removeable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their places of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be

As to the appointment of perpetual commissioners for each county or place, and the making out and keeping of the lists of the commissioners and the delivery of copies.

kept by the officer of the Court of Common Pleas at Westminster, with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke, or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke, or place, and such officer shall deliver a copy signed by him, of the list for the time being for any county, riding, division, soke, or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke, or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same.

Power of perpetual Commissioners.

Power of perpetual commissioners not confined to any particular place.

LXXXII. Provided always, and be it further enacted, that any person appointed commissioner for any particular county, riding, division, soke, or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be.

Special Commissioners.

If, from being beyond seas, &c. a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

LXXXIII. And be it further enacted, that in those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a judge or a master in chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas, at Westminster, or any judge of that Court, to issue a commission specially appointing any person therein named to be commissioners to take the acknowledgment by any married woman to be

therein named of any such deed as aforesaid : (f) Provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said court or judge shall think fit.

(f) The following is the form of a special commission issued under this section:

" I, [name of judge] one of the justices of his majesty's Court of Common Pleas at Westminster, do, by virtue of the statute in that case made and provided, appoint A. B. and C. D. special commissioners, to take the acknowledgment of Ann —, the wife of E. F., now residing at —, in —, of certain indentures of lease and release, by which it is intended to pass the estate of her the said Ann [or to bar the dower of her the said Ann] as a married woman, pursuant to the statute 3 & 4 Will. 4, c. 74. And I do order and direct that this commission shall be executed and returned to the proper officer of the court on or before the — day of —, 1835.

" Dated this 20th day of January, 1835.

" Entered."

The affidavit verifying the certificate of the acknowledgment of a married woman, taken by commission under this section of the act, may be filed subsequently to the filing of the certificate. (*Anon.* 5 M. & Scott, 52.)

As to the old writ called a *dedimus potestatem*, authorizing certain persons therein named to take the acknowledgments of fines, and of warrants of attorney for suffering recoveries, issued from the Court of Chancery, see Cruise's Dig. tit. 35, c. 4, s. 23, &c.; tit. 36, c. 3, s. 8—17; Shepp. T. 5, 9, 39.

Memorandum of Acknowledgment.

LXXXIV. And be it further enacted, that when a married woman shall acknowledge any such deed as aforesaid, the judge, master in chancery, or commissioners taking such acknowledgment, shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed, which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; *videlicet*,

' THIS deed, marked [here add some letter or

When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned:

' the wife of] appeared per-
 ' sonally the wife of and
 ' produced a certain indenture, marked [*here add*
 ' *the mark,*] bearing date the day of
 ' and made between [*insert the names of*
 ' *the parties,*] and acknowledged the same to be
 ' her act and deed : (g) And I [*or we*] do hereby
 ' certify that the said was, at the time
 ' of her acknowledging the said deed, of full age
 ' and competent understanding, and that she was
 ' examined by me [*or us*], apart from her husband,
 ' touching her knowledge of the contents of the
 ' said deed, and that she freely and voluntarily
 ' consented to the same.'

(g) When the above form of certificate to be made by commis-
 sioners for taking the acknowledgments of married women, will
 not suit the particular circumstances of the case, the Court of
 C. P. will make a special order for the alteration in that case.
 Thus where lands were vested in two infant females, one of whom
 was married, and a conveyance had been ordered to be made
 in pursuance of the stat. 11 Geo. 4 and 1 Will. 4, c. 60,
 ss. 6, 7, the commissioners for taking the acknowledgment
 having refused to take the acknowledgment, the court directed
 them to take it, and to omit the words "of full age" in the
 certificate. (*In re Luke*, 5 Moore & Scott, 80; S. C. 1 Bing.
 N. R. 265.) The certificate of the acknowledgments of two
 married women, taken under the 3 & 4 Will. 4, c. 74, stated
 them to have acknowledged the execution of indentures of lease
 and release; they were parties only to the indenture of release.
 The court, upon motion, refused to order the amendment of the
 certificate. (*Ex parte Witty and Salt*, 9 Dowl. P. C. 838.)

Filing of Certificate with Affidavit.

LXXXV. And be it further enacted, that every such certificate as aforesaid of the taking of an acknowledgment by a married woman of any such deed as aforesaid, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas at Westminster, to be appointed as hereinafter mentioned;

Certificate, with affidavit verifying the same, to be lodged with some officer of the Court of Common Pleas, who shall cause the same to be filed of record in the court.

and such officer shall examine the certificate, and see that it is duly signed, either by some judge or master in chancery, or by two commissioners appointed pursuant to this act, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars, as to the consent of the married woman, as shall from time to time be required in that behalf; and if all the requisites in this act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas.

Effect of filing Certificate, relation back.

On filing certificate, the deed, by relation, to take effect from time of acknowledgment.

LXXXVI. And be it further enacted, that when the certificate of the acknowledgment of a deed by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall, so far as regards the disposition, release, surrender, or extinguishment thereby made by any married woman whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment.

Index of Certificates.

The officer with whom the certificates are lodged to make an index of the same.

LXXXVII. And be it further enacted, that the officer of the Court of Common Pleas, with whom such certificates as aforesaid shall be lodged, shall make and keep an index of the same, and such index shall contain the names of the married women and their husbands alphabetically arranged, and the dates of such certificates and of the deeds to which the same shall respectively relate, and such other particulars as shall be found convenient; and every such certificate shall be entered in the index as soon as may be after such certificate shall have been filed.

Copies of Certificate—Evidence.

LXXXVIII. And be it further enacted, that after the filing of any such certificate as aforesaid, the officer with whom the certificate shall be lodged shall at any time deliver a copy, signed by him, of any such certificate to any person applying for such copy; and every such copy shall be received as evidence of the acknowledgment of the deed to which such certificate shall refer.

Officer to deliver a copy of certificate filed, which shall be evidence.

Power of Court of Common Pleas defined.

LXXXIX. And be it further enacted, that the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint the person who shall be the officer with whom such certificates as aforesaid shall for the time being be lodged, and may remove him at pleasure; and the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under this act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings, matters, and things required by this act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations. (h)

Chief Justice of Common Pleas to appoint the officer with whom the certificates shall be lodged; and the court to make orders touching the examination, memorandums, certificates, affidavits, &c.

(h) Mr. Thomas Sherwood, of Serjeants'-Inn, Chancery Lane, has been appointed registrar of certificates and affidavits

of acknowledgments by married women under the above statute.

Disposition of Equitable Interests.

A married woman to be separately examined on the surrender of an equitable estate in copyholds, as if such estate were legal.

XC. And be it further enacted, that in every case in which a husband and wife shall, either in or out of court, surrender into the hands of the lord of a manor any lands held by copy of court roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband in her right, may be entitled in such lands were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are hereby declared to be good and valid. (i)

(i) A feme covert who surrenders copyhold lands ought previously to be examined separately from her husband by the steward of the manor, although by special custom such examination may be made before two customary tenants. (*Driscoll v. Berry v. Thompson*, 4 Taunt. 293. See 1 Watk. on Cop. by Cov. 89.) A custom in a manor required that the consent of the husband to the surrender by his wife, should be expressed in the surrender and admission. A surrender was made by the wife at a general court, and the husband was present at that court, but in the surrender his consent was not expressed: it was held that the surrender was isoperative, and that the court could not infer from circumstances that the husband's consent had been given. It seems that such a surrender would not be good even if the husband were divested of all property at the time. (*Doed. Shelton v. Shelton*, 4 Nev. & M. 857; 3 Ad. & Ell. 265; 1 Harr. & Wol. 287.) A feme covert entitled to a copyhold, surrendered it after secret examination by the steward, to the use of her husband, with his assent, testified by his immediate admittance, and such surrender was held valid. (*Seaman v. Maw*, 3 Bing.

178; 11 Moore, 243; see *Wood v. Lambirth*, 6 Jur. 740.)
 A custom for a feme covert to surrender her copyhold lands without the assent of her husband, is bad. (*Stevens d. Wise v. Tyrrell*, 2 Wils. 1.)

◆

Dispensation with Husband's Concurrence.

XCI. Provided always, and be it further enacted, that if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred (*k*): Provided always, that this clause shall not extend to the case of a married woman where under this act the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and com-

Court of Common Pleas, in the case of a husband being lunatic, &c. may dispense with his concurrence, except where the Lord Chancellor or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

mitment of the custody of the persons and estate of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement in lieu of her husband.

Orders under this act dispensing with husband's concurrence. (k) Upon the affidavit of a married woman that her husband had absconded in 1831 after committing an act of bankruptcy, had never been heard of since, but was believed to be in America, leave was granted for her to pass her contingent life interest in certain freehold property, pursuant to the 77th and 91st sections of this act. (*Ex parte Mary Gill*, 1 Bing. New Rep. 168.)

The reporter of the above case was mistaken in supposing the life estate of the wife to be contingent, the estate was limited to the husband for life, with remainder to trustees during his life to preserve, with remainder to the wife for life, with several remainders over. (See Cruise's Dig. vol. vii., p 1, 4th ed.) The Court of Common Pleas authorized a feme covert to convey her copyhold property, her husband having resided abroad for more than twenty years with another woman. (3 & 4 Will. 4, c. 74, ss. 77, 91. *Ex parte Shirley*, 5 Bing. N. S. 226; 7 Dowl. P. C. 258.) In support of an application for an order to dispense with the concurrence of the husband of a married woman to the deeds of conveyance of certain property, under the 3 & 4 Will. 4, c. 74, s. 91, it was sworn, that the husband had absconded from home, and had since sailed for Port Philip; that since the departure of the ship, his wife had heard nothing of him, and that she believed him to be on his said voyage; that her husband had been made a bankrupt, and that her interest in the property in question passed to his assignees; and also, that her husband having sold the property, she was desirous of completing the conveyance: held sufficient. (*Ex parte Stone*, 9 Dowl. P. C. 843.) The court granted leave to take the acknowledgment of a married woman without the concurrence of her husband, under sections 75 and 91 of the 3 & 4 Will. 4, c. 74; where it appeared that the parties lived together only seventeen weeks after marriage, in 1829, when the husband went away, and the wife after many inquiries was not able to find him. (*Anon.* 2 Jurist, 945, C. P.)

An order that a married woman might be at liberty to make, without the concurrence of her husband, a disposition of lands to which she was entitled as tenant in tail in possession, and tenant in fee simple, was made on affidavit that the wife was entitled to the property, that she and her husband lived separate from each other, and that he had been found a lunatic by inquisition in 1833. (*Ex parte Thomas*, 4 Moore & Scott, 331.)

So an order for dispensing with the husband's concurrence

was made on affidavit, stating the marriage in 1816; that, in 1820, the husband left his wife, and that she had never heard of or received any information respecting him since, and that his present residence was altogether unknown to her; that she was entitled in her own right to the entirety of certain copyhold premises, which she had been compelled to mortgage; and that, if the application were not granted, she would be liable to incur a forfeiture. (*Ex parte Shuttleworth*, 4 Moore & Scott, 332, n. (b.)) In support of an application for a married woman to be permitted to convey her interest in an estate, without the concurrence of her husband, an affidavit was produced, sworn by the sister of the married woman, who stated that the person on whose behalf the application was made was speechless, the court refused to grant the application without an affidavit that the married woman herself had been examined. (*In re Williams*, 2 Scott, N. R. 120; 1 Mann. & G. 881; 9 Dowl. P. C. 72.) The court will not dispense with the affidavit of a married woman herself, upon an application under the 91st sect. of the 3 & 4 W. 4, c 74, for an order for the conveyance of the property of the wife, without the concurrence of her husband. (*Ex parte Bruce*, 9 Dowl. P. C. 840.)

If a married woman levied a fine as a *feme sole* of her own inheritance, *without her husband*, it bound her and her heirs, because they were estopped from claiming the lands, and could not be admitted to aver, contrary to the record, that she was a married woman, unless the husband avoided the fine by entry; in which case the whole estate reverted in the husband and wife, because no act of the wife alone can transfer that interest which the marriage has vested in the husband. (Hob. 225; *Earl of Bedford's case*, 7 Rep. 8; Co. Read. 7 Perk. s. 20; Shep. T. 7.) But a fine levied by a woman *alone*, if it appeared by the record that she was married, was void. (1 Sid. 122.) A fine levied of the wife's estate must, in order to have validity, be the joint act of her and her husband. (*Bell v. Bell*, 1 Ll. & G. temp. Plunket, 58; see *Durnford v. Lane*, 1 Br. C. C. 109; *Milner v. Lord Harewood*, 18 Ves. 275.)

As to fines by married women alone.

There seems to be no case in which the court has authenticated a fine levied by a married woman without her husband; although, where a husband was abroad, the court allowed a fine to be acknowledged *de bene esse*. (*Moreau's case*, 2 Bla. R. 1206.) So where the estate of a married woman had been regularly sold with the consent of the husband, when of perfectly sound mind, and the conveyance was executed by him, and the purchase-money paid, and some difficulty was subsequently made in allowing a fine to pass, on account of the cognisor being a *feme covert*, and her husband at that time in a state of mental incapacity, the court on application refused to make any order on the subject, but intimated that there was no objection to the acknowledgment of the fine being taken, adding *valent quantum valere potest*. (*Stead v. Isard*, 1 Bos.

& Pall. N. R. 312.) In a subsequent case the court refused to interfere in passing a fine levied by a married woman in the absence of her husband, who, having become a bankrupt, had omitted to surrender himself, and was gone beyond sea. (*Ex parte Adney*, 1 Taunt. 37.) So where a rent-charge payable to a *feme covert* for her life was sold for a valuable consideration by herself and her husband, who received the purchase-money, and both executed a deed of conveyance; on an application that the wife might be allowed to levy a fine of the rent-charge without her husband, the court refused to interfere, although the husband was separated from the wife, who was ignorant where he was to be found, after having made diligent search for him. (*Ex parte St. George*, 8 Taunt. 590.)

Where the acknowledgment of a party to a fine was taken before commissioners who were aware of the fact of her being a married woman, and of the non-concurrence of her husband, but the parties were living separate under a deed, by which the husband covenanted not to interfere with his wife's property, the court refused to reverse the fine, at the instance of the husband, but left him to his common law remedy. (*Chesek v. Bootle and others*, 4 Moore & Scott, 460.)

By stat. 6 Geo. 4, c. 74, s. 5, re-enacted by 1 Will. 4, c. 60, s. 8, it is provided, that where it is uncertain whether a trustee be living or dead, or, if known to be dead, it shall not be known who is his heir, or if such heir, being known, shall refuse or neglect, within the time specified by the act, to convey, the Court of Chancery may appoint a person to convey in the place of such missing trustee. In a late case, where it appeared that a trustee had died in 1797, and his heir at law, a female, having married a strolling player many years before, and who had never since been heard of, the Court of Chancery, under the 6 Geo. 4, c. 74, s. 5, appointed a person to convey in the place of the husband and wife, and the Court of Common Pleas allowed a fine levied by the trustee instead of the husband and wife to pass, without investigating the facts, but proceeding on the order of the Chancellor. (*Jackson, dem. Ward and wife, conversees*, 2 Moore & Scott, 566; S. C. 9 Bing. 399.)

By stat. 7 Anne, c. 19, infant trustees were empowered, by the direction of the Court of Chancery or Exchequer, to convey and assure lands vested in them in fee on trust, or by way of mortgage, under which orders were made directing such infants to convey by fine or common recovery, when the circumstances required it; (*Ex parte Bowes*, 3 Atk. 164; *Ex parte Mair*, 3 Atk. 479; *Ex parte Johnson*, Id. 569; *Ann. Com. Rep.* 615;) and now the court will order the acknowledgment of an infant *feme covert*, who is a trustee, to be taken. (*See ante*, p. 383, n. (g).)

Where in a deed of separation between husband and wife, it was agreed that the wife should thenceforth enjoy to her own use all such estates, real and personal, as should come to

her during her coverture, a surrender of a copyhold estate to which she was entitled, without the concurrence of her husband, was held valid. (*Compton v. Collinson*, 1 H. Bl. 334; S. C. 2 Bro. C. C. 376, note by Eden.) But the authority of this case is questionable, (see *Bramhall v. Hall*, Ambl. 467;) for the judgment in this case was founded partly upon the opinion since exploded, (*Marshal v. Rutton*, 8 T. R. 545,) that a *feme covert* might, after articles of separation, be considered at law as standing in the situation of a *feme sole*, and partly on the ground that a surrender by the wife alone might bind her and her heirs, by analogy to the operation of her fine, (*Helps v. Hereford*, 2 B. & Ald. 242,) an analogy not adopted in cases of copyholds. (2 Wils. 2; 1 Ves. sen. 230. See *ante*, pp. 310, 311.)

It seems that a special custom may authorise a surrender by the wife alone, with the assent of the husband. (*Taylor v. Phillips*, 1 Ves. sen. 229; 1 Walk. on Cop. 64.) But a custom for the wife to dispose of her copyhold estate by surrender without the husband's assent is bad. (*Stevens v. Tyrrell*, 2 Wils. 1. See *White v. Driver*, 4 Taunt. 294; *Doe d. Netherlands v. Bartle*, 5 B. & Ald. 492; *Wood v. Lambirth*, 5 Jur. 740.)

It was held, that a surrender of a copyhold estate, to which a *feme covert* was entitled, after secret examination by the steward, to the use of her husband, in his presence and with his assent, testified by his immediate admittance, was valid (*Scammon and others v. Maw*, 3 Bing. 378; S. C. 11 Moore, 243; see *ante*, p. 386, n. (i).)

IRELAND.

XCII. And be it further enacted, that this act Ireland shall not extend to Ireland, except where the same is expressly mentioned. (1)

(1) By 4 & 5 Will. 4, c. 92, the provisions of this act have been extended to Ireland, with the omission of sections 4, 5, and 6, (*ante*, pp. 386—389,) relating to lands held by ancient demesne, and sections 60, 51, 52, 53, 54, (*ante*, pp. 337—343,) 66, 76, 90, relating to copyholds, (see *ante*, p. 354, 363, 386.) The other variations between the two statutes have been already noticed. (See *ante*, pp. 270, 298, 304, 305, 306, 356, 357, 361, 363, 371.)

XCIII. And be it further enacted that this act, or any part thereof, may be altered, varied, or repealed by any act or acts to be passed in the present session of parliament. Act may be altered this session.

ORDERS OF THE JUDGES OF THE COURT OF COMMON
PLEAS, MADE IN PURSUANCE OF THE ABOVE ACT.

The following Orders, in pursuance of the above act, were made in Michaelmas Term, 1833.

14 June
" WHEREAS by the 84th section of the statute made in the 3d and 4th years of the reign of his present majesty, chap. 74, intituled " An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple modes of Assurance," the Court of Common Pleas is authorized from time to time to make alterations in the memorandums and certificates in the said section mentioned.

" AND WHEREAS, by the 89th section of the said act it is enacted, that the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint the person who shall be the officer with whom such certificates as in the said act are mentioned shall for the time being be lodged, and may remove him at pleasure, and that the court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the said Court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under the said act, and touching the particular matters to be mentioned in such memorandums and certificates as therein mentioned, and the affidavits verifying the certificates and the time within which any of the aforesaid proceedings shall take place; NOW IT IS ORDERED, that in addition to the form of the certificate mentioned in the 84th section of the said act, after stating the names of the parties and the words, ' and acknowledge the same to be her act and deed,' the following words should be inserted, ' And I (or we) do further certify, that the several premises comprised in the said indenture are situate in the parish or several parishes and place or places following, that is to say, in the parishes of (as the case may be) in the county of

" AND IT IS FURTHER ORDERED, that where the acknowledgments shall be made before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent of any of the parties in the transaction giving occasion to the taking such acknowledgment, and that in the affidavit verifying the certificate, it shall be deposed, in addition to the verification thereof, that one or more of the persons making such affidavit knew the person or persons making such acknowledgment, and that at the time of making such acknowledgment the person or persons making the same was or were of full age and competent understanding, and that one at least of the commissioners taking such acknowledgment is not the attorney, solicitor or agent, or clerk to the attorney, solicitor, or agent of any of the said parties, and that the names and residences of the said

commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be mentioned in such affidavit.

"AND IT IS FURTHER ORDERED, that the commissioners do inquire of married women whether they intend to give up their interest in the estate to be passed by such deed, without having any provision made for them in return for, or in consequence of their so giving up such interest, and if it appears that any provision is to be made for any such married woman, they shall not take her acknowledgment until they are satisfied that such provision has been actually made, and one of the said commissioners shall state in the affidavit so to be made as aforesaid that such inquiry was made, and also the answer given thereto, and where any such provision has been agreed to be made that he the said commissioner is satisfied that the same has been made, and where such married woman in answer to such inquiry shall declare that she intends to give up her interest without any provision, that he the said commissioner has no reason to doubt the truth of such declaration, and verily believes the same to be true.

"AND IT IS HEREBY FURTHER ORDERED, that the affidavits verifying such certificate, where the acknowledgment is taken by a judge or master in chancery, be in the form hereunto annexed, marked A., and where before any of the commissioners appointed in pursuance of the said act, in the form hereunto annexed marked B. with such variations only as the circumstances of the case shall render necessary.

"AND IT IS HEREBY FURTHER ORDERED, that the certificates and the affidavits verifying the same shall be delivered to the officer to be so appointed within one month from the making of the acknowledgment, and that the officer shall not receive the same after that time without the direction of the court or a judge.

N. C. TINDAL.

S. GASKELL.

J. B. BOSANQUET.

E. H. ALDERSON."

FORM OF AFFIDAVIT verifying the certificate where the acknowledgment is taken before a Judge or Master in Chancery.

A. A. B. of maketh oath and saith, that he
 knows the wife of in the cer-
 certificate hereunto annexed mentioned: and that the
 acknowledgment therein mentioned was made by
 the said and the said certificate
 signed by the said (judge or
 master) therein mentioned in the presence of this

deponent : and this deponent further saith, that the said was at the time of making such acknowledgment of full age and competent understanding.

—♦—
 FORM of AFFIDAVIT verifying the certificate where the acknowledgment is taken by any of the Commissioners, appointed in pursuance of the act of parliament. .

B.

A. B. of in the county of gentleman, one of the attorneys of his majesty's court of at Westminster, and one of the commissioners named in the certificate hereunto annexed, maketh oath and saith, that he knows the wife of in the said certificate mentioned, and that the acknowledgment therein mentioned was made by the said and the certificate signed by the commissioners in the said certificate mentioned on the day and year therein mentioned, at in the county of in the presence of this deponent, and that at the time of making such acknowledgment, the said was of full age and competent understanding : and that the said knew the same acknowledgment was intended for the passing her estate and estates in the premises respecting which such acknowledgment was made : and this deponent further saith, that he this deponent, [or the said J. K. as the case may be, adding, if not the commissioner making the affidavit, whose place of residence is at] is not concerned as the attorney, solicitor, or agent or clerk to the attorney, solicitor, or agent of any or either of the parties to the transaction, giving occasion to the taking such acknowledgment : and this deponent further saith, that in pursuance of the order made by the Court of Common Pleas, in Michaelmas Term, 1833, the said commissioners did inquire of the said [or, if more than one, of each of them, the said] whether she intended to give up her interest in the estates, in respect of which such acknowledgment was taken, without having any provision made for her in return for or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said declared that she did intend to give up her interest in the said estates, without having any provision made for her in return for or in consequence of her so giving up her interest ; which declaration of the said this deponent has no reason to doubt the truth of, and

*x of all and the same in the said case
to this deponent and the said (C. Court)
and lastly (as to locality of premises)*

ORDERS OF THE COMMON PLEAS.

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verily believes the same to be true, [or, declared that a provision was to be made for her in consequence of her giving up her interest in the said estates : and this deponent, before her acknowledgment was so taken, was satisfied, and does now verily believe that such provision has been made.] (m)

N.B.—When the whole of the facts cannot be spoken to by one deponent, the necessary alterations must be made to enable more than one deponent to state their respective parts of it.

(m) Before the stat. 4 & 5 Vict. c. 34, (see *post*, 400) the editor was informed that these affidavits would be required to be written on a 2s. 6d. stamp, but that no stamp is necessary for the certificate ; the commissioners of stamps, who were consulted on the subject, having given an opinion to that effect.



By the following Rules, made on the last day of Hilary term, 1834, the preceding Rules were revoked, but so as not to invalidate any proceedings under the latter which might take place before the 1st of March, 1834. It will be seen that the New Rules do not require the parishes and county where the property is situate to be stated in the certificate, but those circumstances are to be stated in the affidavit.

“ WHEREAS it has been found expedient to make alterations in the General Rules made in Michaelmas term last by this Court, for the purpose of carrying into effect the statute passed in the 3d and 4th years of the reign of his present majesty, cap. 74, intituled ‘ An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance.’

“ AND WHEREAS it is necessary to make Orders touching the amount of the reasonable Fees and Charges to be taken by the several persons appointed to carry the powers of the said act into execution ; and it will be convenient that all the Orders and Regulations made by the Court under the said act should be contained in the same rule :

NOW IT IS HEREBY ORDERED, that the said General Rules be and the same are hereby revoked : Provided that this present Rule shall not be construed in any respect to invalidate any proceedings which, before the 1st day of March next ensuing, shall have been taken, pursuant to the direction of the said Rules of Michaelmas term last.

“ AND IT IS HEREBY FURTHER ORDERED, that where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said act, before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not in any manner interested

in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned.

AND IT IS FURTHER ORDERED, that before the commissioners shall receive such acknowledgment, they, or in case one of them shall be interested or concerned as aforesaid, then such one of them as shall not be so interested or concerned, do inquire of every married woman separately and apart from her husband and from the attorney or solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such interest: and where such married woman in answer to such inquiry shall declare that she intends to give up such her interest without any provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment; but if it shall appear to them or to such one of them as aforesaid, that it is intended that provision is to be made for any such married woman, then the commissioners shall not take her acknowledgment until they are satisfied that such provision has been actually made by some deed or writing produced to them, or if such provision shall not have been actually made before, then the commissioners shall require the terms of such intended provision to be shortly reduced into writing, and shall verify the same by their signatures in the margin, at the foot or at the back thereof.

AND IT IS HEREBY FURTHER ORDERED, that the affidavit verifying the certificate to be made pursuant to the said act, and which certificate shall be in the form contained in the said act, shall (except in such cases where the acknowledgment shall be taken elsewhere than in England, Wales, or Berwick-upon-Tweed) be made by some practising attorney or solicitor of one of the courts at Westminster, or of one of the counties palatine of Lancaster or Durham, and that in all cases it shall be deposed, in addition to the verification of the said certificate, that the deponent (or if more than one person join in the affidavit), that one or more of the deponents knew the person or persons making such acknowledgment; and that, at the time of making such acknowledgment, the person or persons making the same was or were of full age and competent understanding; and that one at least of the commissioners taking such acknowledgment, to the best of his (deponent's) knowledge and belief, is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned; and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit: And

that previously to such acknowledgment being taken, the deponent had inquired of such married woman (or if more than one, of each of such married women) whether she intended to give up her interest in the estate to be passed, and also the answer given thereto; and where any such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true. And where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or, if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said (judge, master, or) commissioners.

"AND IT IS HEREBY FURTHER ORDERED, that the affidavit shall state the parish or several parishes, or place or several places, and the county or counties in which the several premises wherein any such married woman shall appear to be interested shall by deed be described to be situate.

"AND IT IS HEREBY FURTHER ORDERED, that the affidavit shall be in the form hereunto annexed, subject to such variations as the circumstances of the case shall render necessary, or such affidavit may be made where it is found convenient by one of the said commissioners, with such variation in the form thereof as shall be necessary in that behalf.

"AND IT IS HEREBY FURTHER ORDERED, that the certificates and affidavits verifying the same shall, within one month from the making the acknowledgment, be delivered to the proper officer appointed under the said act; and that the officer shall not after that time receive the same without the direction of the court or a judge.

"AND IT IS HEREBY FURTHER ORDERED, that the fees or charges to be paid for the copies to be delivered by the clerks of the peace, or their deputies, or by the officer of the said court, and for taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by the said act to be had, done, and executed, for completing and giving effect to such acknowledgments and examinations, shall be as follows:—(n)

£. s. d.

To a judge or master for taking the acknowledgment of every married woman, of which 7s. 6d. will be paid, in the case of a judge, to his clerk, and the residue thereof will be paid over to the treasury; and in the case of a master, the whole will be paid over to the treasury, or the Fee Fund Account of the Court of Chancery..... 1 6 8

(n) See *ante*, p. 385, s. 89.

3 & 4 WILLIAM IV. c. 74.

	s. d.
To the two perpetual commissioners for taking the acknowledgment of every married woman, when not required to go further than a mile from their residence, being 13s. 4d. for each commissioner	1 6 8
To each commissioner, when required to go more than one mile, but not exceeding three miles, besides his reasonable travelling expenses.....	1 1 0
To each commissioner, where the distance required shall exceed three miles, besides his reasonable travelling expenses.....	2 2 0
To the clerk of the peace, or his deputy, for every search.....	0 1 0
To the same, for every copy of a list of commissioners, provided such list shall not exceed the number of 100 names.....	0 5 0
To the same, for every further complete number of 50 names, an additional.....	0 2 6
To the officer for every search.....	0 1 0
To the same, for every official copy of the certificate.....	0 2 6
To the same, for every official copy of a list of commissioners, provided such list shall not exceed the number of 100 names.....	0 5 0
To the same, for every further complete number of 50 names additional.....	0 2 6
To the same, for preparing every special commission, including a fee of 5s. to the clerk of the Chief Justice or other judge for the fiat.....	0 15 0
To the same, for examining the certificate and affidavit, and filing and indexing the same, as required by the said act of the 3d and 4th Will. 4. c. 74.	0 5 0

"AND IT IS HEREBY FURTHER ORDERED, that the fees and charges to be paid for the entries of deeds, required by the said act to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of land held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders, by which dispositions shall be made under the said act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders, or the memorandums thereof, on the court rolls, shall be as follows:—

	£. s. d.
For the indorsements on the deed of the memorandum of production and memorandum of entry on court rolls, to be signed by the lord steward or deputy steward, each indorsement of memorandum 5s., together	0 10 0
For the entries on the court rolls of deeds, and	

	£.	s.	d.
the indentments thereon, at per folio of 72 words	0	0	6
For taking the consent of each protector of settlement of lands	0	13	4
For taking the surrender by each tenant in tail of lands	0	13	4
For entries of such surrenders, or the memorandums thereof, in the court rolls, at per folio of 72 words	0	0	6

N. C. TINDAL.

J. A. PARK.

J. B. BOSANQUET.

E. H. ALDERSON."

FORM OF AFFIDAVIT, verifying the certificate of acknowledgment taken in pursuance of the act of parliament, to be made by some practising attorney or solicitor, and to be sworn before a judge of the Court of Common Pleas, or a commissioner appointed for taking affidavits in the said court.

In the Common Pleas.

A. B. of _____ in the _____ of _____ gentleman, one of the attorneys [or solicitors] of the court of _____ maketh oath and saith, that he knows

the wife of _____ in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said _____ and the certificate signed by the Judge or Master, or by A. B. of &c., and C. D. of &c., the commissioners in the said certificate mentioned, on the day and year therein mentioned, at _____ in the _____ of _____ in the presence of this deponent, and that at the time of making such acknowledgment the said _____ was of full age and competent understanding, and that the said _____ knew the said acknowledgment was intended to pass her estate in the premises, respecting which such acknowledgment was made. [And this deponent further saith, that]

to the best of this deponent's knowledge and belief, neither of the said commissioners is [or the said A. B. or the said C. D. one of the said commissioners is not] in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned]. [This is to be omitted when acknowledgment taken by a Judge or master.]

And this deponent further saith, that previous to the said

[the married woman] making the said acknowledgment, he (this deponent) inquired of the said [the married woman, or if more than one, of each of them the said

and [the married women], whether she intended to give up her interest in the estates, in respect of which such acknowledgment was taken, without having any provision made for her in lieu of or in return for, or in consequence of

her so giving up her interest in such estates, and that in answer to such inquiry the said [the married woman] declared that she did intend to give up her interest in the said estates, without having any provision made for her in lieu of, or in return for, or in consequence of, her so giving up such her interest; of which declaration of the said [the married woman] this deponent has no reason to doubt the truth, and verily believes the same to be true, or declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent lastly saith, that before her acknowledgment was so taken, he was satisfied, and does now verily believe that such provision has been made by deed or writing, or that the terms thereof have been reduced into writing, and that such deed or writing has been produced to the said judge, [master, or commissioners.] And lastly, this deponent saith, that it appears by the deed acknowledged by the said [the married woman] that the premises wherein she is stated to be interested are described to be in the parish or place of [or parishes or places of and] in the county of [or counties of as the case may be.]

Sworn, &c.

N. B. When the whole of the facts cannot be spoken to by one deponent, variations may be made to enable more than one deponent to state their respective parts of the affidavit.

Affidavit does not require a stamp.

In compliance with the doubts created by the wording of the statutes 55 Geo. 3, c. 184, and 5 Geo. 4, c. 41, it had been the practice to stamp the affidavit rendered necessary by the 3 & 4 Will. 4, c. 74, s. 85, for the verification of the certificate of a married woman's acknowledgment under that act, as not being an affidavit made in any suit. By stat. 4 & 5 Vict. c. 34, which reciting the above two statutes of Geo. 3 and Geo. 4, and reciting further, that doubts having arisen whether the latter has the effect of repealing the duty of 2s. 6d. "on all affidavits whatsoever to be filed, read, or used in the said courts or before the judges, commissioner, or officer therein mentioned, or only in regard to affidavits to be filed and used in any action or suit," enacts, that the duty of 2s. 6d. imposed on the affidavits described in the act of Geo. 3, "shall be adjudged, deemed, and taken to have been repealed, and to have ceased, determined, and put an end to, from the time of the passing of the second recited act (5 Geo. 4) upon all affidavits whatsoever, whether to be read, filed, or used in the said courts, or before the said judges, commissioners, or officers in any action or suit, or otherwise howsoever."

The following additional rules were made in Trinity Term, 1834 :—

"IT IS ORDERED, that from and after the last day of this term, where such parts of the affidavit, verifying the certificate of acknowledgment, taken in pursuance of the late act of parliament, respecting fines and recoveries, as state 'the deponent's knowledge of the party making the acknowledgment, and her being of full age,' cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made shall consider competent so to do.

"AND IT IS FURTHER ORDERED, that where more than one married woman shall at the same time acknowledge the same deed, respecting the same property, the fees directed by the said rules to be taken shall be taken for the first acknowledgment only.

"And the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one-half of the original fees, and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property.

"And where, in either of the above cases, there shall be more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit.

"In every case the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only.

N. C. TINDAL.

J. A. PARK.

S. GASKELE.

J. B. BOSANQUET."

The rules made in Michaelmas term, 1833, are retained in this edition, because the validity of certificates of acknowledgment made in pursuance of them previously to the new orders, or before the 1st March, 1834, must be tried by them. One material circumstance required by the first rules, but omitted in the second, was, that the certificate should state the parishes or places in which the property comprised in the deed acknowledged was situate (see *ante*, p. 392); by the new rules, that fact must be stated in the affidavit of taking the acknowledgment.

Before any person can take upon himself to depose to that fact the deed to be acknowledged ought to be carefully examined. There are three modes in describing parcels in deeds; the most usual is to insert the description in the operative part by abutments and names of parishes, and not unfrequently general words of all other lands in particular parishes or counties are added. A second mode, which occurs more commonly where mortgages or estates vested in trustees are to be transferred, is to insert the description of the parcels in the

recital of some prior deed or deeds, and to refer in the operative part to all the lands comprised in such deeds. A third mode is, to refer in the operative part to the estates comprised in a schedule to the deed, in which case the parcels should be accurately described in such schedule. (See 2 Prest. Conv. 446, &c.)

The statute for abolishing fines and recoveries contains no clauses of a penal nature; it should therefore seem that the forging of a certificate of acknowledgment by a married woman is only a misdemeanor. (See 2 Rums. on Crimes, 317, 2d ed.) Whether a false affidavit of such an acknowledgment be perjury or not, deserves consideration. (See Id. 518—522.) The acknowledgment of a deed by any person in the name of a married woman, without her privity or consent, does not appear to come within the statute 1 Will. 4, c. 66, s. 11, except it be a conveyance by a tenant in tail, inasmuch as other deeds of married women do not require enrolment, and that section of the act applies only to "any deed to be enrolled."

On account of the importance which courts of justice attached to the records of their proceedings, they would not allow any averment or evidence to contradict them, and fines and recoveries could not in general be set aside by showing that the parties to them were infants or lunatics.

It may become a question whether the same binding force will, under the new act, be attributed to the certificate, after it has been duly signed and filed of record, as to other records of the court, or whether the court will allow facts falsely stated in the certificate of the commissioners, either inadvertently or wilfully, to be controverted, by showing, for instance, that the party making the acknowledgment was at that time an infant, or not of competent understanding; or whether the same reasons which formerly precluded parties from impeaching the records of fines and recoveries will be applicable to the certificates of acknowledgment of deeds by married women. (See Shelford's Law of Lunatics, 243—250.)

It will be observed that the rules contain no directions as to the persons before whom the affidavits of the acknowledgments of married women are to be made; as to those in this country, it is understood that they must be sworn before a commissioner of the Court of Common Pleas. The practice as to those taken abroad will probably be principally regulated by the rule made in Hilary term, 14 Geo. 3, as to recoveries, and adopted as to fines, 1 Taunt. 144, by which it is provided that in case the party or parties shall be in Scotland, then the affidavit or affidavits shall be made by one of the clerks of his Majesty's signet, and sworn before one of the judges or other persons duly authorized to take affidavits or depositions in the court of session or Court of Exchequer (but see 2 & 3 Will. 4, c. 54, by which the latter court is to be abolished,) in that part of the united kingdom. But if the party or parties shall be in Ireland, or in any other parts beyond the seas, then the affidavit or affidavits shall be made by one of the commissioners

Affidavits of acknowledgment, before whom to be sworn.

who hath taken the acknowledgment of the warrant or warrants of attorney, and shall be sworn either before some person duly authorized to take affidavits in the Court of Common Pleas, or before some magistrate of the place where such acknowledgment shall be taken, having authority to administer an oath, and in the presence of a public notary, which notary shall also certify in writing under his hand and seal, as well the administering of the said oath, as also the name, signature, and office of the magistrate administering the same. (See *Wilson on Fines*, 253—256.)

The court directed the officer to receive an affidavit verifying the certificate of an acknowledgment by a married woman, under the stat. 3 & 4 Will. 4, c. 74, made by a notary public at Karlsruhe in Germany, the commissioner himself declining to make the affidavit. (*In re Powsall*, 2 Scott, N. R. 188; 1 Mann. & G. 973; 9 Dowl. P. C. 46.) An affidavit of married woman's acknowledgment of a deed in foreign parts was admitted, on showing that affidavits are not usually signed at *Hamburgh*. (*Ex parte Bird and Bell*, 4 Bing. N. R. 394.)

An affidavit verifying the due taking, in Russia, of the acknowledgment of a deed by a married woman, made before the British consul, was held sufficient; it having been stated in the notarial certificate, made in a former case, that the laws of Russia do not grant authority to any magistrate to administer oaths to any person whatever. (*Davy and others v. Maltwood*, 2 Mann. & G. 424; *Ex parte Bayley or Daly*, 2 Scott, N. R. 823; 9 Dowl. P. C. 380; *Re Barber*, 4 Id. 640; *Re Eady*, 6 Id. 615.)

The affidavit verifying the acknowledgment of a married woman, taken in Philadelphia, commenced as follows:—"Be it remembered, that on the 10th December, 1840, came before me J. B. Esq. alderman of Philadelphia, &c., J. S., &c., and in due course of law deposed and swore, &c." It then proceeded in the form of an affidavit, was subscribed by the deponent, and was accompanied by the usual notarial certificate. The court directed the affidavit to be received, although it was not in exact compliance with the rule of H. T. 4 Will. 4. (*Ex parte Shaw*, 9 Dowl. P. C. 830.) The court refused to file the certificate of the acknowledgment by a married woman, resident in America, verified by an affidavit made before a notary public, without an affidavit that notaries public are the proper officers for taking affidavits in America; and also as to the identity of the commissioners. (*Anon.* 3 Jur. 125; 8 C. nom. *Ex parte Mann*, 7 Scott, 142; 5 Bing. N. C. 226.)

Where an acknowledgment is taken abroad, the affidavit verifying the certificate need not name the place where it is taken. In this country it is necessary that it should appear that the acknowledgment was taken before commissioners duly authorized to act in the place where it is taken. But the same reasons do not apply in the case of an acknowledgment taken abroad. (*Re Shuffelbottom*, 6 Scott, 898.)

The following is a form of a notary public's certificate. (See *Hands on Fines*, 71, 247, 3d ed.) "I, A. B. notary public, of lawful authority admitted and sworn, dwelling in the city of Charleston, in the State of South Carolina in North America, hereby certify that C. D. of Charleston in the State of South Carolina in North America, gentleman, on the — day of — instant, was sworn in my presence to the truth of the affidavit hereunto annexed, by and before E. F. prothonotary of the Court of Common Pleas for Charleston district. And I do hereby certify that the said E. F. is prothonotary of the said court, and as such usually administers oaths; and that the name C. D. subscribed to the said affidavit, and also the name E. F. subscribed to the jurat thereof, are of the respective proper handwritings of the said C. D. and E. F., and were respectively signed by them in my presence. In testimony whereof I have hereunto set my hand and notarial seal the — day of —, in the year of our Lord 1835.

(Seal)

A. B.
Notary Public.

Where a warrant of attorney for suffering a recovery was acknowledged in a part of the East Indies, far distant from the residence of any notary public or British magistrate, an affidavit of the acknowledgment made before a British consul or agent there, was held sufficient. (3 Taunt. 275.) So where a fine had been acknowledged in France, and the magistrate who had authority to administer oaths there, improperly declined to administer the oath, and the affidavit was sworn before two English magistrates who happened to be there at the time, the court allowed the fine to pass. (2 Bos. & P. N. R. 57.)

The notarial certificate required in the case of a fine acknowledged in a foreign country, must have been under seal; a defect in that particular could not be supplied by proof of the handwriting of the cognizors. (*Cruttenden v. Bourbell*, 1 Taunt. 143.) But the seal was dispensed with in attesting the taking of the acknowledgment of a vouchee in a country where the notaries did not use a seal, (4 Taunt. 573,) and in another case where the seal had been broken. (2 Moore & P. 558.) It was decided that a British consul at a foreign port had no authority under the statute 6 Geo. 4, c. 87, s. 20, (which authorizes the consul-general or consul to administer an oath whenever the same should be required, and to do all such notarial acts as a notary public may do,) to administer an oath of the acknowledgment of a party levying a fine. (*Ex parte Hutchinson*, 1 Moore & P. 559. See 5 Taunt. 184; *Harrison's Index*, 1172, 1173, 2d ed.) A British consul has power by stat. 6 Geo. 4, c. 87, s. 20, to certify as to the handwriting and authority of the party before whom is sworn the affidavit verifying the certificate of taking an acknowledgment of a married woman (abroad), under 3 & 4 Will. 4, c. 74. (*In re Barber and Ward's trustees*, 2 Scott, 436.)

British con-
sul.

By stat. 3 & 4 Will. 4, c. 42, s. 42, the superior courts of common law and equity at Westminster have the same powers of granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the said courts respectively, as they then had in the counties in England and Wales, and town of Berwick-upon-Tweed, and in the Isle of Man, by virtue of the statutes then in force, (see 29 Car. 2, c. 5; 6 Geo. 3, c. 50, s. 2; 5 Geo. 4, c. 106, ss. 9, 10; 11 Geo. 4 and 1 Will. 4, c. 76, s. 18,) and persons falsely swearing before persons so authorized are liable to the penalties of perjury. In Scotland and Ireland it should therefore seem that the affidavit must be sworn as required by the preceding rule, or before a person authorized, under the statute 3 & 4 Will. 4, c. 42, s. 42, to take affidavits in those countries. The stat. 55 Geo. 3, c. 157, empowers the courts of law and equity in Ireland to grant commissions for taking affidavits in all parts of Great Britain. An affidavit verifying the certificate of acknowledgment, taken in pursuance of the 3 & 4 Will. 4, c. 74, s. 79, was sworn in Ireland, not before a commissioner appointed for taking affidavits in the Court of Common Pleas, there having been no such commissioner appointed for Ireland under the 3 & 4 Will. 4, c. 42, s. 42, but before a commissioner for taking affidavits in the Court of Common Pleas in Ireland. The officer appointed by the commissioner to file the certificates and affidavits under the 89th section of the 3 & 4 Will. 4, c. 74, having declined to receive the certificate and affidavit on the ground that the latter was not sworn before a person properly qualified; on a motion to have them filed, *Tindal, C. J.*, said the statute, and the rules of court made in pursuance thereof, require the affidavit of the taking of the acknowledgment to be sworn before a judge of this court, or a commissioner appointed for taking affidavits in this court. The affidavit in this case is a mere nullity; perjury could not be assigned upon it. (*In re Anderson*, 2 Scott, 626. See *Rex v. Verist*, 3 Camp. 432.)

In *Reddell v. Nash*, 8 Moore, 632, it seems to have been considered that the affidavit of the acknowledgment of a fine taken in Normandy could not be sworn before the British consul resident there, the mayor having previously refused to take such affidavit, on the ground that the proceedings were not in the French language, and that at all events it should have been shown that there was no other magistrate at Caen than the mayor, before whom the affidavit might have been sworn. (See *In re Barber and Ward's Trustees*, 2 Scott, 436.) The statutes and cases stated respecting the practice as to fines and recoveries, may serve, in the absence of express authority, as some guide for the course to be adopted as to affidavits of acknowledgments of married women abroad; but in case of doubt the better plan will be to ascertain from the officer what will be required; or in case of his refusal to receive such affidavits as may have been made, an application may be made to the Court of Common Pleas.

LAW OF DOWER.

3 & 4 WILLIAM IV. c. 105.

An Act for the Amendment of the Law relating to Dower. (a)

[29th August, 1833.]

DEFINITIONS.

BE it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing.

Meaning of
the words in
the act.

"Land."

Number.

The objects
of this act.

(a) The principal objects of this statute are,
1st. To make *equitable* estates in possession liable to dower, and to dispense with the necessity of the actual seisin of the husband.

2d. To take away the right of dower out of lands disposed of by the husband in his lifetime or by will, and to give partial charges created by the husband priority over the right of dower.

3d. To enable the husband to bar the right of dower by a declaration in deed or will. The act does not extend to widows married on or before the 1st of January, 1834.

The reasons upon which the alterations in the law of dower are founded, will appear by the following extract from the

First Report of the Commissioners of Real Property; reference to some of the decisions upon the subject will be found in the notes by the editor.

"The present law of dower gives to a surviving wife a right to have assigned to her for her life one-third of all the lands and hereditaments, (with a few exceptions, such as common *sex nembre* and personal annuities,) (see Co. Litt. 32 a.) of which her husband was seized in law, (that is, had the legal property by descent, there being at the same time no possession,) or, in fact, for an estate of inheritance in possession at any time during the marriage, notwithstanding any alienation or disposition which the husband may have made of the estates, or any part of them.

"[Dower is due of mines wrought during coverture, whether by the husband or by lessees for years, whether paying pecuniary rents or rents in kind, and whether the mines are under the husband's own land, or have been absolutely granted to him to take the whole stratum in the land of others. Such a grant is a grant of a real hereditament in fee simple. But dower is not due of mines or strata unopened, whether under the husband's soil or under the soil of others. If lands assigned for dower contain an open mine, tenant in dower may work it for her own benefit. (*Stoughton v. Leigh*, 1 Taunt. 401.)—Ed.]

"[The widow of a man to whom an estate was devised in fee, with a limitation over to the testator's heir, in case the devisee had no children or issue, was held to be entitled to dower. (*Moody v. King*, 10 Moore, 233; S. C. 2 Bing. 447.)—Ed.]

"It does not give dower out of lands to which the husband had a right, but of which he had not seisin in law or in fact.

"The widow is not entitled to take possession of any land for her dower, the assignment is to be made by the heir; and if he neglect it, or do it unfairly, she can compel a just assignment by legal process, and generally recover compensation for the detention.

"[To entitle a widow to damages in dower, it must be alleged and proved that the husband died seized of an estate of inheritance. (*Jones v. Jones*, 2 C. & J. 601; S. C. 2 Tyrw. 531.)—Ed.]

The heir has no right to denude the estate of timber as against the dowress; therefore where a testator died seized of certain estates, out of which his widow was entitled to dower, the heir of the testator entered into possession of the estates and cut down timber, the produce of which timber was paid into court, it was held that the widow was entitled to a third of the produce for life. (*Bishop v. Bishop*, 5 Jer. 931.)

"This law appears well adapted to the state of freehold property which existed at the time when it was established, and during a long period afterwards; alienation was at first prohibited, and it long remained rare; a disposition by will, Old law of dower adapted to former state of things.

except as to estates in a few districts devisable by custom, was not allowed, so that the estate of the husband descending of course to his heir, there was not likely to be any difficulty in finding the lands, a share of which was to be assigned, nor any interference with the property of third persons in making the assignment; besides all which there was no fund for maintaining the widow but the real estate.

Become inconvenient.

"This state of things has for a long period been so much changed, as to make the original law of dower highly inconvenient. Estates are now frequently conveyed away and charged by the husband, and it is desirable that there should be a power of so doing free from the burden of dower. The great increase too of personal property affords other means of providing for widows.

Bar of dower by jointures.

"The legislature long since, by the statute 27 Hen. 8, c. 10, provided a method of diminishing the evil to some extent, by making a jointure of a certain description given before marriage a bar of the right of dower, though such jointure may be of inadequate value, and made to the wife before she has arrived at the age at which she is enabled to assent to such provision, (see *post*, p. 411.) Courts of equity have enlarged the remedy by making some provisions not strictly within the terms of the statute bars of dower: Courts of equity have also obviated the inconveniences arising from dower, and also very materially restricted and impaired the right to dower, by holding that equitable estates, a modification of the ownership of real property, which has been introduced since the law of dower was established, and now exists to a very great extent, are not subject to dower; and further, by holding that a purchaser may protect himself against the dower of the vendor's wife in legal estates, by procuring the assignment to a trustee for himself of an outstanding legal term, (in reality a mere fictitious estate,) decisions scarcely reconcilable with principles of justice (as they make the rights of parties liable to be affected by technical rules and fictions), and contrary to a general principle laid down with respect to equitable estates, that equity should follow the law, and at variance with the principle of decisions in the analogous case of the husband's tenancy by the curtesy, which is held to attach to equitable estates. (See *post*, note to last section.)

Equitable estates not subject to dower.

Protection by terms of years.

Statutable bar inconvenient.

"It may be observed here, that the statutable bar by jointure depends at law, and in case of the marriage of a female under twenty-one years in equity also, on the validity of the title of the jointure; it is therefore troublesome in questions with purchasers. (See *Simpson v. Gutteridge*, 1 Madd. R. 609; *Corbet v. Corbet*, 1 Sim. & Stu. 612; S. C. 5 Russ. 254; *Sugd. V. & P.* 335, 8th ed.; 1 *Id.* 358, 9th ed.)

Conveyance to uses to bar dower.

"In order to defeat the right of dower in cases not within the statute, and to which the above decisions would not apply, purchasers have long had recourse to the contrivance of taking conveyances of estates in a very artificial form, called a *Con-*

veyance to uses to bar dower, which, while it confers the whole beneficial ownership, and an absolute dominion over the legal estate, prevents the legal estate from so vesting in the purchaser as to make the property subject to his wife's dower. This ingenious form of conveyance, which was long in being perfected, and is now nearly universal, is found in practice to be attended with some inconveniences, and owing to the mistakes of unskilful practitioners, it occasionally leads to serious mischiefs.

" [The form of limitation to uses to bar dower, which has been almost universally adopted, was in effect to such uses as the purchaser, by deed or writing executed in the presence of two witnesses, should appoint. In default of and until appointment to the purchaser for life, remainder to a trustee and his heirs during the life of and in trust for the purchaser, remainder to the purchaser, his heirs and assigns. (See *Gilb. on Uses*, by Sugd. 321—325, n. ; *Fearne*, 347, n. by Butl. 7th ed.)—*Ed.*]

" By all these means the law of dower is in most instances evaded ; where husbands find their estates subject to dower, they very frequently make provision for their widows on the condition of their relinquishing their dower ; and sometimes without knowing that the right to dower exists, or without expressly noticing it, they make provisions for their widows, and at the same time make dispositions of their fee simple estates inconsistent with the enjoyment of dower by the widow, or which, by clear implication, indicate that dower is not meant to be enjoyed by the widow. Provisions by will in lieu of dower.

" These last modes of defeating dower are found to be from various causes very uncertain, and often open to questions, and they are not unfrequent sources of litigation, in which the widow finds herself involved, or is tempted by the uncertainty of the law to engage.

" The general result is, that the right to dower exists beneficially in so few instances, that it is of little value considered as a provision for widows, and we believe it may be confidently asserted, that it is never calculated on as a provision by females who contract marriage or their friends ; yet there is so much of uncertainty in the modes by which dower is prevented, that the actual or possible existence of the right is a very frequent and serious impediment to the transfer of property, and the ascertaining in each case that it does not exist in the widows of any of the persons through whom the property has passed, or procuring the necessary acts to be done for preventing or barring it where it does or may exist, or securing the future production of the evidence of its non-existence, are the causes of frequent and great delay and expense attending such transfers. Thus where there is no person who can derive any benefit from the law of dower, that law exists often as a clog to the transfer of property, sometimes as a legal pretext for delaying the performance of a contract, and some- General result that dower is of little value as a provision for widows.

times as the inevitable cause of, or a mischievous temptation to, litigation. Generally we conceive, that the right to dower may be said to exist to a great extent to the injury of proprietors and purchasers, and to a comparatively small extent for the benefit of widows, and to some extent also to their injury, in leading them into or involving them in litigation.

Principle on which the right to dower may be sustained.

"The true principle (as we think) on which the law of dower was originally established, and on which it has a claim on grounds of justice and policy (without sacrificing the general convenience) to be supported, is, that it should be considered as that interest in an estate of inheritance which the law takes from the heir of a deceased proprietor for the support of his widow, whose claims in natural justice and policy appear to stand at least on an equal footing with the claims of the heir; it is so far analogous to the provision which a law, established in more modern times, has made for the widow out of the husband's personal estate undisposed of by his will. By combining this principle with another of high and perhaps paramount importance, a principle which the law has carefully established almost to its fullest extent, viz. that a right of alienation should be inseparably incident to property of every description, we think that the law of dower may be put on a footing more beneficial on the whole to widows, and free from nearly all the present inconveniences and mischiefs.

"The distinction as to dower between the husband's seisin and his mere right, we think, in the present state of things, irrational. (See *post*, p. 416.)

Proposed alterations of the law of dower.

"We propose that dower should attach upon all estates of inheritance in possession, excepting the species of property to which dower is not incident; and on property considered in equity as real estate of or to which any husband dies seised or entitled in fact or in law, whether legally and beneficially, or beneficially only, which, if belonging to the wife, would be subject to the husband's curtesy, but subject, like the interest of other persons having partial interests in the inheritance, to any estates, charges, or incumbrances which the husband may have lawfully created, or bound himself to create, and to his debts, so far as they attach on his freehold estates, and as to estates which he can affect by his will, to any disposition, direction, or declaration made by his will, executed so as to affect freehold estate, and that dower should not attach on any other estate.

"By this enactment the artificial distinction between legal and equitable estates will be taken away; on the other hand, the subtle contrivances to which we have referred will become unnecessary.

Provisions in case of wills,

"We propose that a provision made by will for a widow out of personal estate shall not deprive her of dower, unless the will, expressly or by clear implication, shall so direct, but that any devise of freehold estate shall be held to be free from dower, unless the contrary be declared.

"And that as to estates which the husband might by his will dispose of against his wife's right to dower, he may by his will duly executed declare that such right should be discharged without making any further disposition. And we propose that the enactments shall not interfere with the rule of courts of equity, giving widows a preference over other legatees for legacies given to them in satisfaction of dower. And we propose that a declaration in any deed or instrument of giving or devising estates of inheritance, may make the estate of the donee or devisees not subject to his wife's dower; but these enactments not to prevent courts from enforcing, on equitable principles, covenants or agreements of husbands not to bar the right to dower, nor to prevent the barring of dower by agreement or settlement, or its forfeiture by adultery.

"We do not propose at present to extend the alterations of the law of dower to gavelkind lands or borough-english lands, or to copyhold or customary lands, as to all which the right to dower or freebench is regulated by a variety of peculiar customs. We deem it expedient to postpone the recommendation of any further alteration of the laws relating to those several tenures, until the whole subject shall come under our view." (1 *Real Prop. Rep.* 16—19. As to tenures, see *Real Prop. Rep.* 3—22.)

(b) In consequence of two maxims of the common law—*Jointures*. first, that no right can be barred until it accrues; and, secondly, that no right or title to an estate of freehold can be barred by a collateral satisfaction—it was impossible to bar a woman of her dower by any assignment or assurance of lands, either before or during the marriage. (*Vernon's case*, 4 *Rep.* 1; *Co. Litt.* 36 b.)

Before the passing of the statute of uses, (27 *Hen.* 8, c. 10,) the greater part of the lands in England having been conveyed to uses which were not liable to dower, (Dyer, 266, pl. 7; 4 *Rep.* 1 b.) it was usual to make a provision for the wife before marriage out of the husband's lands. (3 *Rep.* 58 b.; 4 *Rep.* 1 b.; *Wilmot's Notes*, 184, 5.) The statute of uses having transferred the legal estate to the *cestui que use*, all women then married would have become dowable of lands held to the use of their husbands, and retained their title to lands settled on them in jointure. To prevent that injustice, it is by the sixth section of the statute of uses declared, that a woman having an estate in jointure with her husband, (five species of which are enumerated,) shall not be entitled to dower; and the ninth section reserves to the wife a right to refuse a jointure or to claim her dower. (See *Wilmot's Notes*, 184, &c.) It was decided that the species of estates enumerated are proposed only as examples, and the courts have in construction extended the operation of the statute to other instances within its principle, though not within its words. (4 *Rep.* 2 a.) By the effect

of that statute, therefore, no widow can claim both jointure and dower. Jointure before marriage is a peremptory bar of dower; jointure after marriage she has an option to renounce. (1 Swans. 429, n.) A jointure within that statute is defined to be a competent livelihood of freehold to the wife of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least, if she herself be not the cause of its determination or forfeiture. (Co. Litt. 36 b., 37.)

According to Lord Coke, (Co. Litt. 36 b.) there are six requisites to a strict legal jointure, viz. 1st, The provision for the wife must by original limitation take effect in possession or profit immediately after the husband's death. (*Ward v. Shirley*, Cro. Jac. 488.) 2d. It must be for the term of her own life, or greater estate. (Dyer, 97 b.) 3d. It must be made to herself, and no other for her. 4th. It must be made in satisfaction of the whole, and not of part of her dower. 5th. It must be either expressed or averred to be in satisfaction of her dower. (See 9 Mod. 152; 3 Atk. 8; 1 Ves. sen. 54; 4 Ves. 391.) And, 6th. It may be made either before or after marriage. (4 Rep. 3.)

In equity, a trust estate, an agreement to settle lands as a jointure, or a covenant from the husband that his heirs, executors, or administrators, would pay an annuity to his wife for her life, in case she survived him, in full for her jointure and in bar of dower, without expressing that it should be charged on lands, or in short, any provision, however precarious, and whether secured out of realty or personalty, which an adult before marriage accepts in lieu of dower, is a good jointure. (*Earl of Bucks v. Drury*, 5 Br. P. C. 570; 4 Br. C. C. 506; Wilmot's Notes, 177; *Charles v. Andrews*, 9 Mod. 152; *Williams v. Chitty*, 3 Ves. jun. 545; *Tinney v. Tinney*, 3 Atk. 8; *Carruthers v. Carruthers*, 4 Br. C. C. 500; *Estcourt v. Estcourt*, 1 Cox, 20; *Simpson v. Gutteridge*, 1 Madd. R. 613; 4 Rep. 2 a., n. by Thomas; Harg. Co. Litt. 36 b., n. (5); 1 Sugd. V. & P. 362—364.) A future contingent provision, accepted by an adult female upon her marriage in lieu of dower, is in equity a valid bar to dower. (*In re Herons*, 1 Flan. & K. 330. See *Poxer v. Sheil*, 1 Moll. 312; *Williams v. Chitty*, 3 Ves. 545; *Corbet v. Corbet*, 1 Sim. & S. 612; 5 Russ. 254.) A *feme covert* is not competent during the coverture to elect between a jointure made to her after marriage and her dower at common law. The consent of a married woman to release her jointure, and accept an allowance during the life of her husband, who was a lunatic, without prejudice to her right to dower, was held not to be binding upon her after his decease. (*Frank v. Frank*, 3 My. & Cr. 171.)

A jointure settled on a wife by articles to which she was not a party, will not deprive her of dower; (*Earl Buckingham v. Drury*, 3 Br. P. C. 497; *S. P. Daly v. Lynch*, Id. 48;) but

an infant having before her marriage a jointure made to her in bar of dower, is thereby bound and barred by the stat. 27 Hen. 8, c. 10, (Id.)

As to the law of jointures, see 1 Rop. on Husband and Wife, c. 10; Cruise's Dig. tit. vii.; Bac. Abr. Dower and Jointure (G.); Gilh. on Uses, by Sugd. p. 321, &c.

(c) The result of the cases as to the doctrine of attendant Terms of years attending the inheritance. terms may be thus stated;—When there is an old term that is satisfied, the inheritance being the estate, the interest in the term attends upon it. If there be a first, second, and third mortgagee, they are, according to their respective gradations, entitled to the benefit of the term. It is possible that some or all of them may not know of its existence; and according to the practice of conveyancers, sanctioned by and perhaps growing out of the doctrines of courts of equity, if a subsequent incumbrancer, without notice, gets in the term, he gains a priority; if, at the time of advancing his money, he had notice of the previous incumbrances, he does not gain priority. (Per Lord Eldon in *Mole v. Smith*, Jac. R. 496. See *Radnor v. Vandebendy*, Show. P. C. 69; S. C. Pr. Ch. 65; *Swannock v. Lifford*, 2 Atk. 208; Amb. 6; Co. Litt. 208 a, n.; *Willoughby v. Willoughby*, 1 T. R. 763.)

An heir, though he can avail himself at law of a term attendant upon the inheritance, is not allowed in a court of equity to defeat the widow's claim of dower; for having a certain quantity of interest, equity must consider her as having a corresponding interest in the term. When the husband conveys to a purchaser, without the concurrence of the wife, nothing but the husband's estate passes subject to dower, which remains as it was. (*Maundrell v. Maundrell*, 7 Ves. 578; S. C. 10 Ves. 246.) But a purchaser for valuable consideration, or a mortgagee, (*Wynn v. Williams*, 5 Ves. 130,) may protect himself from dower by taking an actual assignment of a term created before the right of dower attached, to a trustee for himself, or a declaration of trust from the trustee, or by obtaining possession of the deed creating the term, (7 Ves. 567; 10 Ves. 246,) notwithstanding he had notice of the right of dower. (10 Ves. 271; see Butl. Co. Litt. 290 b, n. 1, s. 13.)

In *Mole v. Smith*, (Jac. R. 490; S. C. 1 Jac. & W. 665,) an attendant term having become vested in the wife of the owner of the inheritance, as the administratrix of the trustee of the term, and her husband having become a bankrupt, his assignees agreed to sell the estate, and filed a bill for a specific performance of the agreement, pending which suit the husband died; it was held, that the widow was not entitled to dower, that she must assign the term for the benefit of the purchaser, and that he was bound to accept the title.

DOWER OF EQUITABLE ESTATES.

Widows to
be entitled to
dower out of
equitable
estates.

II. And be it further enacted, that when a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, (d) shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint-tenancy,) (e) then his widow shall be entitled in equity to dower out of the same land.

(d) The legal estate in certain freeholds was vested in K. as mortgagee in fee, subject to the equity of redemption of F.; K. also claimed to be entitled to an undivided moiety in these freeholds, which claim was disputed by F., but was established by a decree at the Rolls; after K.'s death it was held that the legal and equitable interest had not been so united in K. as to entitle his widow to dower out of his undivided moiety. (*Knight v. Frampton*, 10 Law Journ. N. S. Chanc. 247.)

Origin of rule
not allowing
dower out of
equitable
estates.

The general principle on which courts of equity have proceeded in cases of dower is, that dower is to be considered as a mere legal right; and that equity ought not to create the right, where it does not subsist at law.

Nothing can be more striking than the inconsistency of the doctrine which subjected trust estates to the right by curtesy, while it exempted them from the claim of dower. Courts of equity had assumed as a principle, in acting upon trusts, to follow the law; and, according to that principle, they ought, in all cases where rights attached on legal estates, to have attached the same rights upon trusts, and consequently to have given dower of an equitable estate. It was found, however, that in cases of dower, that principle, if pursued to the utmost, would have affected the titles to a large proportion of the estates in the country, as parties had been acting on the footing of dower upon a contrary principle, and had supposed that by the creation of a trust, the right of dower would be prevented from attaching. Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion, if courts of equity had followed their general rule with respect to trusts in the cases of dower. But the same objection did not apply to a tenancy by the curtesy, for no person would purchase an estate subject to such right, without the concurrence of the person in whom it was vested. (*D'Arcy v. Blake*, 2 Sch. & Lef. 388.) A widow is not entitled to freebench of a trust estate in copyholds. (*Forder v. Wade*, 4 Br. C. C. 520.)

Where an estate was subject to a mortgage *in fee* at the time of the marriage, and continued so during the coverture, the widow was not entitled to dower, as at law the whole legal inheritance was vested in the mortgagee; and the right of redemption was merely an *equitable* title, insufficient to create a claim of dower. (*Dixon v. Saville*, 1 Br. C. C. 326.) Where the husband was seised merely as a mortgagee or trustee, the wife was entitled to dower at law, but subject in equity to the same right of redemption or trust as her husband was liable to, but a court of equity would interfere to prevent a widow from taking advantage of her legal right. (*Hinton v. Hinton*, 2 Ves. sen. 634; see 2 Freem. 43, 71; 1 Burr. 117; Butl. Co. Litt. 205 a., n. (1), 18 ed.)

So a woman is not entitled to dower of estates of which the husband was seised in fee, subject at the time of his marriage to leases for lives, which did not expire during the coverture. (*D'Arcy v. Blake*, 2 Sch. & Lef. 387; Fitz. Abr. Dower, pl. 184; Br. Abr. Dower, pl. 44; Co. Litt. 32 a.; Co. Litt. 208 a., Harg. note; Perk. 333, 348; *Forder v. Wade*, 4 Br. C. C. 520.) On the surrender in deed or in law of the life estate to the husband the right of dower will attach. (1 Roll. Abr. 676, pl. 40.) But if a rent be reserved on a lease for years, made before marriage, the wife will be entitled to recover dower of the third part of the rent immediately, and also of the land, with a *cessat executio* during the term. (Prec. Ch. 250.) And the wife of a man entitled to lands under a devise to him in fee or in tail, subject to a chattel interest for raising the testator's debts, is dowerable after payment of them. (Co. Litt. 41 a.; 8 Rep. 96 a.; 2 Vern. 404.)

(e) The widow of a joint tenant in fee or in tail is not entitled to dower, because, upon the death of one of the joint tenants, the estate goes to the survivor, who is then in from the first grantor, and may plead the deed creating the estate as originally made to him, without naming his companion. (Litt. s. 45; Co. Litt. 37 b., 30 a., 183 a.) And if a joint tenant alien his share, his wife shall not be endowed. (Fitz. N. B. 150; Br. Dow. pl. 30; Cro. Jac. 615.)

SEISIN OF HUSBAND.

III. And be it further enacted, that when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have

Seisin shall not be necessary to give title to dower.

recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced. (e)

Right of entry.

(e) A right of entry is where a man who has the possession of lands is disseised or ousted, or, having a right to the possession, is kept out of it; in which case he may peaceably make an entry upon the lands, or bring an action of ejectment to recover the possession. (See Rosc. on Real Actions, 79 &c.; 1 Real Prop. Rep. 493.) We have already seen (*ante*, p. 226,) that no descent cast or discontinuance made after the 31st December, 1833, is to bar a right of entry, and that continual claim will not preserve it. (*Ante*, p. 164.) The time within which a right of entry must be prosecuted is now prescribed by stat. 3 & 4 Will. 4, c. 27. (See *ante*, p. 116—185.)

Seisin.

Seisin is a technical term, to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. (1 Burr. 107.) One of the circumstances required to give a title of dower before this act was, that the husband should be seised during the coverture of the estate whereof the wife is to be endowed. A seisin in law was sufficient, without a seisin in deed.

A seisin in law, in its usual acceptation, is where the inheritance in lands and hereditaments of which a man died seised or possessed descends upon his heir, who dies before entry or possession. (Litt. s. 448.) In such a case, if the heir leave a widow, she will be entitled to dower. (Litt. s. 681.)

On conveyances under the statute of uses, the bargainee or *cestui que use* is seised in law immediately on the delivery of the deed, and therefore his wife was dowable, although no entry had been made by him, nor other act done to acquire an actual seisin. As if lands were bargained and sold, and a stranger entered, and then the deed was inrolled and the bargainee died, his wife would be endowed; (2 And. 161; Gilb. Uses, by Sugd. 213; see Cro. Jac. 604;) but if the husband had died before inrolment, she would not have been endowed. (Gilb. Uses, 213.)

But wherever an actual entry was necessary to give effect to a conveyance, as in the case of an exchange at common law, the wife was not entitled to dower, unless the husband had entered. (Perk. s. 368; Park on Dower, 34.)



ALIENATION, &C. BY HUSBAND.

IV. And be it further enacted, that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will. No dower out of estate disposed of.

V. And be it further enacted, that all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower. (f) Priority to partial estates, charges, and specially debts.

(f) Before the above act, after a title of dower had once attached, it was not in the power of the husband alone to defeat it by any act in the nature of alienation or charge. (3 Lev. 386; Co. Litt. 32.) It was a right attaching by implication of law, which, although it might never take effect, (as if the wife died in the husband's lifetime,) yet from the moment that the facts of *marriage* and *seisin* had concurred, was so fixed as to become a title paramount to that of any person claiming under the husband by subsequent act. (Co. Litt. 32 a.; F. N. B. 147 (E).) The alienation of the husband, therefore, whether voluntarily, as by deed or will, or involuntarily, as by bankruptcy, &c., would not defeat the wife's right of dower against the husband's alienee, against whom dower might be recovered in the same way as against the heir of the husband dying seised. The consequence of the above rule was, that all charges or derivative interests created by the husband after the title of dower had attached, were voidable as to that part of the land which was recovered in dower. (Shep. T. 275; *Stoughton v. Leigh*, 1 Taunt. 410; Co. Litt. 46 a.; 7 Rep. 8, 72; Jenk. Cent. p. 36; see *Park on Dower*, pp. 237, 238.)

Freebench, in the absence of any custom to the contrary, Freebench. does not attach even in right until the husband's death; (Carth. 275; 12 Mod. 49; 3 Lev. 385; 2 Ves. sen. 633; 2 Atk. 526; 2 T. R. 580; 3 Ves. jun. 256;) and therefore any alienation by him *alone*, even by contract, (2 Ves. sen. 631,) to take effect in his lifetime, will defeat the widow's claim. (*Benson v. Scott*, 3 Lev. 385; *Godwin v. Winsmore*, 2 Atk. 526; *Farley's case*, Cro. Jac. 36; Moor, 758; *Dagworth v. Radford*, Sir W. Jones, 462; 1 Freem. 516; Gilb. Ten. 321. See 2 Watk. on Cop. 73—79.) By the custom of the manor of Cheltenham, as settled by stat. 1 Car. 1, the widow of a copyholder is entitled to dower out of customary lands of which her husband was tenant during the coverture,

although such lands had been aliened during the coverture by the husband alone, without the wife having been examined in court or joined in the surrender. (*Riddell v. Jenner*, 10 Bing. 29; S. C. 3 M. & Scott, 673.) Where lands held of that manor, between the time of alienation by the husband and of his death, have been improved in value by buildings, the widow is entitled to dower, according to the value at the time of his death, although one-third remain not built upon. And if the lands so aliened are, at the death of the husband, in the possession of several persons, whether by the immediate act of the husband or the act of his alienee, dower must be assigned as to one-third of the lands of each such possessor. (*Doe d. Riddell v. Gwinnell*, 1 Gale & D. 180.) Where lands, at the death of the husband, are in possession of several persons, whether by the husband's act, or by the act of his alienee, dower must be assigned as to one-third of the lands in each person's possession; and where they have been improved in value by buildings subsequently to the time of alienation, the widow is entitled to dower according to their respective actual value at the time of the husband's death, though more than one-third of the whole remains unimproved. (*Doe d. Riddell v. Gwinnell*, 6 Jurist, 235.)

The widow of a tenant in tail of copyhold is entitled to freebench, though there is no custom as to the freebench of widows of tenant in tail, but only as to the freebench of widows of tenants in fee. (*Doe d. Duke of Norfolk v. Sanders*, 3 Dougl. 303; see 1 Scriv. on Cop. 89—96, 3d edit.)

By the custom of gavelkind, the wife, after the death of her husband, shall have for her dower a moiety of all lands of her husband so long as she continues chaste. (*Rob. on Gav. by Wilson*, pp. 205—236.)

Dower may be barred by a declaration in a deed;

VI. And be it further enacted, that a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

or by a declaration in the husband's will.

VII. And be it further enacted, that a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

VIII. And be it further enacted, that the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband duly executed as aforesaid. Dower shall be subject to restrictions.

IX. And be it further enacted, that where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will. (g) Devise of real estate to the widow shall bar her dower.

(g) In *Marston v. Ros*, 2 Nev. & P. 504; 8 Ad. & Ell. 14, a question was raised, but not decided, whether a will made by a testator in contemplation of marriage, in which he devises certain real estates to his future wife for life, operates to bar her right of dower under 3 & 4 Will. 4, c. 105.

A devise by a husband for the benefit of his wife, who was entitled to dower, did not operate as a satisfaction of such right, unless an intention was expressed, or could be inferred, that the gift by the husband was in lieu of dower, in which case the wife could not claim both, but was put to her election. When widow was put to election. Several cases occurred upon this subject, which are collected in *Rep. on Husband and Wife*, by Jacob, c. 11, s. 3; and see *1 Powell on Devises*, by Jarman, 447—455. The right to dower being in itself a clear legal right, an intent to exclude that right by voluntary gift must, before this act, have been demonstrated by express words, or by clear and manifest implication. In order to exclude such right, the instrument itself must have contained some provision inconsistent with the assertion of such legal right. (2 Sch. & Lef. 452, 453.) It was decided by the House of Lords, that a devise to the widow of a part of the land out of which she was dowable, did not exclude her from her right of dower; the sole possession of a part of the lands, out of which the dower is to issue, not being deemed inconsistent with the assertion of a legal right to the third of the whole estate. (*Lawrence v. Lawrence*, 2 Vern. 365; 8 C. Freem. 244; 3 Br. P. C. 484; 1 Swanst. 398, n.; 1 Br. C. C. 292, n. by Belt; see *Roadly v. Dixon*, 3 Russ. 192; *Miall v. Brain*, 4 Madd. 126; *Butcher v. Kemp*, 6 Madd. 61; *Hall v. Hill*, 1 Con. & L. 120.) A testator devised all and singular the rents, issues and profits of his copyhold lands, to be applied to the maintenance of his children, until the youngest should have attained twenty-one, subject in the meantime and charged with an annuity to his wife, so long as she should continue his widow, and upon his

youngest child attaining twenty-one, he devised all and singular his said copyhold lands among all his children equally; and he devised all and singular his freehold, tithes and lands, upon the same trusts as he had declared respecting his copyhold estates, subject to the annuity to his wife; and he bequeathed the use of all his household goods and furniture to his wife, so long as she should continue his widow: it was held, that the widow was entitled both to the benefits given by the will and to her dower. (*Dowson v. Bell*, 1 Keen, 761; see *Harrison v. Harrison*, 1 Keen, R. 765.) A widow is not bound by receiving an annuity given in lieu of dower, until she has an opportunity of knowing that the assets are sufficient for payment of the annuity. (*Eland v. Eland*, 2 Jur. 852.) The widow's acquiescence in payments made to her for several years of one third of the dividends arising from the proceeds of the sale of an estate subject to her dower, may amount to an election to take her dower in preference to the devised estate. (*Parker v. Downing*, 2 Jur. 28.) In an action for the recovery of dower, a plea by the tenant in May, 1833, that the demandant had elected to receive an annuity in satisfaction of dower, was not supported by shewing the demandant's receipt of dividends of the stock for securing the annuity in September, 1833; for the latest time in respect of which evidence of satisfaction would have been admissible, was at the time of plea pleaded. It seems that a court of law cannot properly take cognizance of an election of a widow to take something in lieu of dower, such a question being for a court of equity. (*Slatter v. Slatter*, 1 Bingham, N. S. 259; S. C. 5 Moore & Scott, 82.)

Where the terms of the devise express or clearly imply that it was the testator's intention that the devise of part of the lands, though *only for the life* of the widow, should be in satisfaction of dower out of the remainder, she will be put to her election. (*Chalmers v. Stovill*, 2 Ves. & B. 224; *Dickson v. Robinson*, Jac. R. 503.) A testator charged his estates with payment of his debts and of an annuity to his wife, in lieu of dower. The real estates having been sold to pay the debts, and the income of the remaining proceeds being insufficient to pay the annuity, it was held that the widow was entitled to have her annuity paid out of the capital as well as the income of the remaining fund; and it was also held (the annuity being wholly in arrear) that the arrears were to be computed from the testator's death. (*Stamper v. Pickering*, 9 Sim. 176.)

It will be observed that the above act has given the husband complete power to defeat the right of dower, either by deed or will; and where any interest in the land liable to dower is given to the wife, in order to preserve the right of dower, an intention to that effect must be declared, although no gift to the wife out of personal estate is to defeat the right of dower, unless an intention to do so be declared by the will.

X. And be it further enacted, that no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will. (h)

(h) A bequest of personalty never operated in bar of dower unless an intention to that effect clearly appeared. (*Dyres v. Willis*, 1 Ves. sen. 230.)

AGREEMENT NOT TO BAR DOWER.

XI. Provided always, and be it further enacted, that nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them. (i)

(i) In purchasing an estate free from dower by force of this act, it should be ascertained that the vendor has not bound himself by agreement not to bar his wife's dower. (2 Sugd. V. & P. 227, pl. 26, 10th ed.)

PRIORITY OF LEGACIES IN LIEU OF DOWER.

XII. And be it further enacted, that nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies. (k)

(k) When a general legacy is given in consideration of a debt owing to the legatee, or of his relinquishing any right or interest, since the bequest is not made as a bounty, like other general bequests, but as purchase-money for the collateral right or interest, it will be entitled to a preference of payment to the other general legacies, which are merely voluntary. (See 1 Rep. on Leg. 372, 2d ed.; Wms. on Executors, 839; 1 Fonbl. on Eq. 372.) Upon this principle, when a legacy is given to a wife in lieu or satisfaction of dower, she is not, in case the assets should prove deficient, to abate in proportion

to the other legatees. (*Burridge v. Brady*, 1 P. Wms. 127; *Blower v. Morret*, 2 Ves. sen. 420; *Davenhill v. Fletcher*, Ambl. 244.) Therefore where a testator, who had by a post-nuptial settlement made certain provisions for his wife, which were expressed to be in bar of dower, bequeathed to her specific legacies and a sum of money, adding, that what he had so given her, together with the provision made for her by the settlement, should be in lieu of any dower which she might claim; the assets having proved insufficient for the payment of the legacies in full, it was held that the wife was entitled to priority over the other legatees, and that the legacy given to her ought not to abate proportionally with the other legatees. (*Heath v. Dendy*, 1 Russ. 545.) It seems that the principle of these cases applies only where, at the death of the testator, the widow is entitled to dower. (Id. 545.)

DOWER AD OSTIUM, &c. ABOLISHED.

Certain dowers abolished.

XIII. And be it further enacted, that no widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris. (l)

(l) An account of this species of dower, which had long become obsolete, will be found in Litt. ss. 38, 39, 40; Co. Litt. 34 a.; 2 Bl. Comm. 132, 133.

SAVING AND RESTRAINING CLAUSE.

Act not to take effect before the 1st January, 1834.

XIV. And be it further enacted, that this act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said first day of January one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower. (m)

(m) The remedies for the recovery of dower have already been adverted to. (See *ante*, pp. 220, 221.) And as to what arrears of dower may be recovered, see *ante*, p. 253.

It may become a question whether or not widows who were married on or before the 1st January, 1834, will be entitled to dower out of *equitable* estates under the second section of the act. (*Ante*, p. 414.)

TENANT BY THE CURTESY.

Tenant by the curtesy of England is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case the husband shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England. (Litt. ss. 35, 52; 2 Bl. Comm. 126.)

Four circumstances are requisite for enabling the husband to be tenant by the curtesy:—1st. A legal marriage; but if the marriage be voidable only, the husband will be tenant by the curtesy, unless the marriage be actually avoided during the lives of both parties. (*Hicks v. Harris*, Carth. 271; 2 Salk 548; 4 Mod. 182. See 2 Ves. sen. 245; 7 Rep. 43 b.) 2d. The wife must have a seisin in deed of corporeal hereditaments, (Co. Litt. 29 a.) either before or after issue born. (Id. 30 a.) The receipt of rent reserved on a lease for years amounts to an actual seisin; (*De Grey v. Richardson*, 3 Atk. 469;) but the husband cannot acquire such a seisin of an estate let on a lease for life before marriage, as will entitle him to be tenant by the curtesy, unless the lease determine during the coverture. (Co. Litt. 29 a, 32 a.)

Requisites of
a tenancy by
the curtesy.

A husband will not be tenant by the curtesy of an estate tail of which the wife was not seised during the coverture. (Co. Litt. 29 a.) Therefore, where tenant in tail by lease and release conveyed to trustees to the use of herself till marriage, then to the husband for life, then to herself for life, then to the first and other sons of the marriage, and the wife died first; it was held, that the husband was not entitled to a life estate under the settlement, nor as tenant by the curtesy, a base fee only having passed by the settlement voidable by the entry of the issue in tail. (*Doe d. Nevills v. Rivers*, 7 T. R. 276.)

As to incorporeal hereditaments, a seisin in law is sufficient. Thus, if a man seised of an advowson or rent in fee has issue a daughter, who is married, and dies leaving issue before the advowson was void or the rent became due, the husband will be tenant by the curtesy, although his wife had only a seisin in law. (Co. Litt. 29 a, and notes by Harg.)

Where there is a devise in fee simple, with an executory devise over, the husband's right to curtesy attaches on the first estate, and is not defeated by its determination. As where there was a devise to trustees in fee, in trust for A. until she attained twenty-one or married, and then to the use of her and her heirs, with a devise over, in case she died under the age of twenty-one, and without leaving issue. A. married, had a child which died, and then the mother died under twenty-one; and as the wife, during her life, continued seised of a fee simple to which her issue might by possibility inherit; it was held, that her husband was entitled to be tenant by the curtesy. (*Buckworth v. Thirkel*, 10 Moore, 235, n.; 2 Bing. 447; 3

Bos. & P. 652, n.; 4 Dougl. 323. See 2 Sim. 251, 2; 2 Rep. on Husband and Wife, Jac. ed. addenda, No. 2; Butl. Co. Litt. 241 a., n. (4); *Boothby v. Vernon*, 9 Mod. 147.)

But where an estate was devised to A. and her heirs, but if she died, leaving issue, then to such issue and their heirs, and A. died, leaving issue; it was held, that her husband was not entitled to be tenant by the curtesy, because the estate, which the wife had, determined on her death, leaving issue, by which the children took as purchasers by force of the gift, and not by descent from her. (*Barker v. Barker*, 2 Sim. 249.)

3d. The wife must have issue born alive in her lifetime, and capable of inheriting the estate. (Co. Litt. 29 b.; 8 Rep. 34 b.; Dyer, 25 b.)

4th. The last circumstance required to consummate the right of the husband, is the death of the wife. (Co. Litt. 30 a.)

Copyholds.

Copyholds are not subject to curtesy, except by custom, (4 Rep. 22 a, 30 b.; *Paulter v. Cornhill*, Cro. Eliz. 361.) to which resort must be had for determining what portion of the lands of a feme copyholder a husband will take. It is generally an estate for the life of the husband, if there be issue, as at common law; but in gavelkind lands, a moiety only, so long as he continues unmarried, whether there be issue or not. (Co. Litt. 30 a, 111 a; 2 Sid. 153; Rob. on Gav. by Wilson, pp. 177—204; 1 Scriven on Cop. 97, 3d ed.)

Equitable estates.

Equity follows the law in the quality of estates, and therefore a husband will become tenant by the curtesy wherever the wife, during the coverture, is in possession of an equitable estate of inheritance, and has issue by such husband capable of inheriting such estate. The wife may have an equitable inheritance, notwithstanding a direction to pay the rents to her separate use; and if the wife be in receipt of the rents during the coverture, and there be issue capable of inheriting, the husband will be entitled to be tenant by the curtesy. (*Morgan v. Morgan*, 5 Madd. 408; *Herle v. Greenbank*, 3 Atk. 715; *Pitt v. Jackson*, 2 Br. C. C. 51.)

The husband may be excluded in equity by an express declaration, that, upon the death of the wife, the inheritance shall descend to the heir of the wife, and that the husband shall not be tenant by the curtesy, (*Bennett v. Davis*, 2 P. Wms. 316.) although a partial exclusion from the enjoyment of the property will not have that effect. (5 Madd. 412.)

The real property commissioners suggested some alterations in the law of curtesy, and a bill for carrying them into effect was brought into parliament, but did not pass. (See 1 *Real Prop. Rep.* pp. 19, 20, 70, 71.)

By stat. 3 & 4 Will. 4, c. 74, s. 22, (*ante*, pp. 313, 314,) an estate by the curtesy qualifies a person to be protector of a settlement.

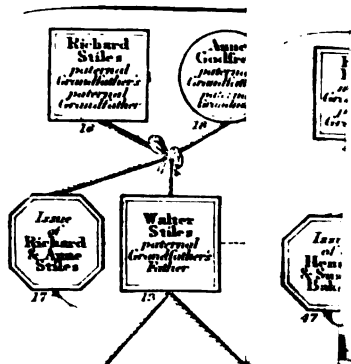
In dealing with property which has descended from a married woman, it is necessary to inquire whether she has left a husband who is entitled to be tenant by the curtesy.

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LAW OF INHERITANCE.

3 & 4 WILLIAM IV. c. 106.

*An Act for the Amendment of the Law of
Inheritance. (a)*

[29th August, 1833.]

DEFINITIONS.

BE it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say) the word "land" shall extend to "Land." Meaning of words in the act.

manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-english, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency;

"The purchaser."	and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and
"Descent."	the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the
"Descendants."	expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "the
"Persons last entitled."	person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word
"Assurance."	"assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and
Number and gender.	every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

The objects
of the act.

(a) The leading objects of this act are :

1st. To alter the root of descent by tracing the descent from the person last entitled, unless it be proved that he took by descent, thus superseding the rule that the descent should be traced from the person who last died actually seised.

2d. To declare that the heir of a testator taking under his will shall be considered as taking as *devisee*, and that under a limitation to a grantor or his heirs, such person shall be considered as a *purchaser*.

3d. To declare that brothers and sisters shall not inherit immediately from each other, but that every descent from them shall be traced through the parent.

4th. To enable the lineal ancestor to inherit from his issue in preference to collateral relations. Thus, on failure of lineal descendants of the last owner, inquiry is to be made for the father, and not for the brother or sister, nephew or niece; for the grandfather, and not for the uncle, aunt, or cousin, ascending in the first instance to the immediate parent, and then

again descending to his issue, as in a course of transmission from him ; and so, as to every more remote lineal ancestor and his issue, in each degree. But preference is given to the male ancestral line throughout.

5th. To make the half-blood capable of inheriting next after any relation in the same degree of the whole blood and his issue.

6th. To allow descents to be traced through persons who have been attainted.

(b) The report of the commissioners of real property will explain the general object of the alterations made by this act, and for further information on the important subject of the law of descents, the reader is referred to 2 Bl. Comm. 200, 240 ; Bl. on the Law of Descents ; Watkins and H. Chitty on Descents ; Bac. Abr. and Com. Dig. Descents ; Hale's Hist. C. L. 206—248.

" The rules which govern the transmission of freehold estates of inheritance at common law, on the decease of an absolute proprietor, in the absence of express disposition by him, are (for the most part) well understood, and appear to be well suited to the habits and feelings of the people. State of the law of descents before the new act.

" By these rules an estate descends to the eldest or only son, or his descendants, if he should be dead, leaving issue, and next to the second and other sons, according to priority of birth, and their descendants ; in default of sons and their descendants it descends to daughters in equal shares, if more than one, and to the descendants of any deceased daughters, such descendants taking the share which would have gone to the parent if living.

" When there is no lineal descendant, the estate goes to the eldest or only brother of the whole blood, that is, who was born of the same father and mother as the deceased proprietor, and to his descendants, if he should be dead, leaving issue, and to the other brothers in succession and their descendants. If there be no brother or descendants of a brother, the sisters of the whole blood succeed in equal shares, and the descendants of deceased sisters, such descendants taking their parent's share as before.

" In case of the failure of brothers and sisters and their descendants, it becomes necessary to inquire whether the deceased proprietor took the estate himself by inheritance, or whether he acquired it immediately by a deed or will, or in technical language was a purchaser.

" In the former case the heir is to be sought in the family from which the estate descended to the deceased proprietor, that is, either on the father's side or on the mother's side, as it happened ; in the latter case the law gives the preference to the relations on the paternal side, but if there be none such, then it directs the inheritance to go to the relations on the maternal side.

" Here occurs a rule, drawn from feudal principles, which Exclusion of

the ascending line. is at variance with ordinary feelings and notions, and has been long considered unjust; every lineal ancestor of the deceased proprietor, whether near or remote, is excluded from immediately inheriting. An estate may pass to the younger brother of the father, and upon his death it may pass to the father as his heir; but rather than go at once to the father or the mother of the deceased proprietor, the law directs it to escheat, that is, to fall, as for want of an heir, to the lord of whom the land was holden; that is, in most cases, to the crown. [By the sixth section of the act 3 & 4 Will. 4, c. 106, the lineal ancestors are admitted.]

“In default, however, of lineal and immediate collateral heirs and their descendants, the inheritance is to be traced through the nearest ancestor, that is, the father, unless it be a maternal inheritance, and if it be a maternal inheritance, the mother, and it will pass to his or her eldest brother of the whole blood or his descendants, and the other brothers in succession and their descendants; and if none such, to sisters of the whole blood and their descendants, in equal shares as before. In failure of this line, the next more remote ancestor on the same side is made the stock in the same manner, and then the next more remote, and so on; the rule being still observed that the paternal line has the preference in ascending from the first purchaser, and that up to the first purchaser the inheritance must be traced back through the line of ancestors by which it descended.

Preference of the paternal line.

“If heirs in the pure male line ascending from the first purchaser should fail, then, in compliance with a rule above stated, a female ancestor, or some ancestor of a female ancestor, is to be made the stock; and first, it is a rule that such female ancestor is to be taken on the paternal side, if any such can be found; and therefore the brother of the paternal grandmother (the father's mother) is preferred to the brother of the mother of the deceased proprietor, he having been the first purchaser.

“Here sometimes, though rarely, occurs a point about which a difference of opinion has existed for a long series of years.

Question with respect to female stocks on the paternal side.

“According to some authorities, when a female stock on the paternal side is to be introduced, proximity of blood is to have the preference, and consequently collateral relations of the paternal grandmother are to be preferred to collateral relations of the paternal great grandmother. According to other authorities (and this is the doctrine maintained by Mr. Justice Blackstone in his Commentaries,) the pedigree is still to be traced up as far as possible on the paternal side through males, and the female ancestor of the remotest male ancestor is to be preferred as a stock to the female ancestor of a less remote male ancestor, the paternal great grandmother to the paternal grandmother.

Heirs must be

“On failure of relations on the paternal side of the first

purchaser, the maternal line is let in, that is, the mother of the first purchaser is considered as the stock, and her ancestors, of the blood first on the paternal and then on the maternal side, as before, of the first purchaser. It is to be observed, that on failure of heirs of the last proprietor on the side of the first purchaser, the estate does not pass to the heirs of the last proprietor on the other side, but escheats as before, so that an estate descended to the deceased proprietor from his mother, can never pass to his collateral relations on the father's side.

"It has been laid down, in the above statement, that collateral relations, in order to be let in to inherit, must be of the whole blood of the person from or through whom they are to derive their claim. Exclusion of the half-blood.

"Thus a brother of the deceased proprietor by the same father, but a different mother, cannot inherit the deceased proprietor, whether he took by purchase or descent. The estate will rather escheat, and the same is the case with an uncle, half-brother of the father, and so on. This rule, like that which excludes the lineal ancestor, has long been felt to rest on no sound principle, and to be hard in its operation.

"We think that both these rules may be taken away, without introducing any uncertainty into the law of inheritance, or materially impairing its symmetry.

And, 1st. *As to the Ascending Line.*

"It appears desirable that the lineal ancestor should be let into the succession in such order as to infringe as little as possible on the present rules, and to found the new rule upon some principle already established, making it agreeable, so far as may be, to the feelings of the people, and to the general policy of the law of inheritance. This we think may be best done by introducing the ancestor wherever the descendants of such ancestor would be entitled according to the present rules; the ascending line would thus come in immediately after the descending. If the purchaser of an estate died without issue, and intestate, leaving a father, that father would take before the brothers or sisters or their descendants; and if there were neither father nor brothers or sisters, or their descendants, a surviving grandfather would take before uncles or aunts. Conformity in the laws regulating different species of property is desirable, with a view to the better general understanding of the law. Accordingly one recommendation of this rule is, that it would make the transmission of real property, in one case, conformable to the law now long established for the transmission of personal property, which, in case of the intestacy of a person dying unmarried and without issue, goes exclusively to the father as next of kin—a law which it is believed has not been found inconvenient, nor considered unfair or objectionable. The father, too, as the general dispenser of the family property, seems the fittest Ancestor to come in when his issue would have inherited by the old law.

person to have the control over whatever is to devolve by law upon some part of his family.

Descent between brothers and sisters not to be immediate.

"By a technical rule of pleading, the descent from one brother or sister to another has been hitherto considered immediate, and in the opinion of some persons it would be better to consider that as a substantial rule, and to prefer brothers and sisters to the father: this however would be introducing an anomaly, especially if the principle were not followed up by postponing generally the ancestor to his descendants, the grandfather, for instance, to the uncle. [See sect. 5 of act 3 & 4 Will. 4, c. 106, *post.*]

"It may be argued in support of such proposal, that the ancestor, who is likely to be advanced in life, may be expected to be less capable of making a discrete disposition of his property, that he may be tempted unfairly to divert it to his issue by a different marriage, or even to make some disposition altogether capricious and unreasonable; but the dependence of children on their parents is acknowledged to be salutary, and when it is considered that the proposed change of the law will only come into operation in the absence of express disposition, and therefore, it may be presumed, for the most part, where no strong reason was felt by the deceased proprietor for making a disposition, the general good of the family seems likely to be best consulted by vesting the property in its head, rather than in any of the younger members, and, as already observed, less violence will thus be done to the general system of the law of inheritance.

Ancestor not to be restricted to a life estate.

"The same reason we consider should prevail against a plan which has been proposed, of giving to the ancestor an interest during his life only.

2d. *As to the Half-Blood.*

Whole blood of first purchaser to be preferred only between kindred in equal degree.

"We think it advisable that no distinction should exist between the whole and the half-blood, except that preference should be given to the whole blood of the first purchaser, as between his kindred in equal degree or their descendants, with the exception of a single case afterwards mentioned.

"The following reasons seem to us sufficient for putting the whole blood and the half-blood on an equal footing, with the above exception.

Reasons for restricting the preference of whole blood.

"1st. One ancestor only of any couple of ancestors being the person from or through whom the inheritance descends, it seems needless to have any regard to the other ancestor. Thus if land descend from the father to the eldest son, there seems no reason why it should not pass from him to the second son, whether born of the same or another mother.

"2d. The rule is recommended by the principle of conformity already suggested, as in the transmission of personal estate, the whole blood and half-blood stand on an equal footing, and so in case of descent of a title of nobility, or of an estate tail.

" 3d. The difference between the whole and the half-blood, however well understood by lawyers, is, it is believed, not familiar to the public; lands are therefore liable to be left to descend contrary to the intention of the owner, and they are liable to be claimed and to be possessed contrary to the law without an evil intention; and further, in deducing the title on sales of estates, the circumstance of the half-blood, being not of very frequent occurrence, is liable to be overlooked by those who prepare the abstract of title, and by those who know nothing of the pedigree but what is laid before them, and thus a bad title may be approved of by the advisers of a purchaser for valuable consideration and accepted by him: whatever leads to insecurity of titles is of course, independently of other considerations, greatly objectionable.

" Some of the above reasons apply with equal force to the case in which a person who died seized was himself the purchaser.

" The reason which has inclined us to give a limited preference to the whole blood in this case is, that when one parent has issue by another marriage, the connection between the members of the two families is felt to be much less than between the members of each family. If a brother leave a whole brother or sister, or the issue of either of these, and also an elder brother by a different marriage, it would be repugnant to common feelings and notions, to direct his estate to descend to the half brother, although if he left a brother or sister of the half blood, or the issue of such, and only a more remote relation of the whole blood, the proximity of kindred would seem to give a reasonable preference to the former. It would be desirable if, with reference to the half blood, a distinction could be drawn between the case of a purchaser by his own act, according to the familiar use of the word purchaser, and that of a purchaser in the mere technical sense of the word, that is, a person who may have succeeded perhaps to the family estate, but is considered as a purchaser, because it comes to him through some deed or will, and not by inheritance, and in the latter case to put the whole and the half blood on an equal footing; it is considered, however, impracticable to frame a law founded on this distinction, which should be clear and simple, except, indeed, that a power may be given to the person from whom the property comes, of directing that it shall be taken as if it descended from a particular line of ancestors, as hereafter explained, in which case we think the distinction of the whole and half blood may also be taken away.

Reason for giving the restricted preference.

" It is proposed, therefore, that the whole blood of the first purchaser, who took without reference to any ancestor, shall be preferred, as between persons claiming through the same ancestor of the first purchaser to the half blood, and that, subject to this preference, the distinction between the whole and the half blood shall be abolished.

[The half blood are now capable of inheriting under the ninth section of 3 & 4 Will. 4, c. 106, *post*.]

3d. *As to the Female Ancestor.*

Blackstone's
rule as to fe-
male ancestor
to be adopted.

"With respect to the question as to the preference of the nearer or more remote female ancestor on the paternal side, the case having, it is understood, occurred more than once since the Commentaries were published, it seems expedient to settle it, and the symmetry of the rules of inheritance appears most consulted by adopting the rule laid down by Mr. Justice Blackstone. It is proposed to declare this to be the law, and to extend it of course to the case of direct ascent, so that the mother of the paternal grandfather would be preferred to the mother of the father." [Four tables are subjoined to the First Real Property Report, one showing the order of inheritance as laid down by Mr. Justice Blackstone; the others showing the order of inheritance according to the proposed alterations.]

4th. *Limitations to Special Heirs.*

Inconven-
ience of the
law regarding
the blood of
the first pur-
chaser.

"The rule above mentioned, which directs that where the inheritance passes to collateral relations of the last proprietor, those only are admitted to take who are of the blood of the first purchaser, occasioning an estate to pass sometimes in a different channel where the deceased owner had inherited the estate, and where he had acquired it by what the law denominates purchase, although the distinction is often, as has already been observed, only technical, introduces complexity, and sometimes causes anomalous diversities in the transmission of estates.

"Thus, if a person acquired an estate immediately under a will or settlement made by his maternal ancestor, that estate would descend to his relations on the father's side, and would not return to the family from which it came, until the father's line were exhausted. On the other hand, if it came from a maternal ancestor by descent, strictly so called, all the relations on the paternal side would be excluded; and rather than pass to them, the estate would escheat. In consequence again of a principle of courts of equity, that a man cannot be a trustee for himself, and that where a beneficial estate is in the same party with the legal estate, it is absorbed by the latter, cases have occurred where the course of descent of an inherited estate, the title to which was equitable, has been changed by the accident of the mere legal estate (that is, what may be called the *fictitious* estate of the trustee) descending from the other line of ancestors, and absorbing the equitable estate. An additional inconvenience arises from the occasional nicety of the distinction between strict descent and purchase, according to the technical sense of the latter word—a circumstance which sometimes makes the channel of descent a matter of question.

Reason
against abro-
gating the
law.

"It has been proposed to remedy these inconveniences by considering every person who dies owner of an estate of fee-

simple, as the stock from whom alone the inheritance is to be traced as if he had been first purchaser.

"It is apprehended, however, that such a rule would occasionally produce very objectionable consequences. Thus, if an heiress died under age, leaving a child who should also die under age and without issue, the estate would necessarily be carried from her family to the family of her husband.

Estates may be limited to descend to heirs on the part of a specified ancestor.

"This proposal, therefore, is not recommended as a general rule.

"It has, however, occurred to us, that a person devising or settling an estate in fee-simple, might be allowed to direct that the donee or devisee should take the estate as if it had come to him from a particular ancestor; that an estate, for instance, might be given to a man and his heirs on the part of his mother. The attempt to create limitations of this nature has been frequently made; the law now forbids such limitations in grants of estates in fee-simple, although it allows them on the creation of estates tail. We incline to the opinion that allowing them in the former case would be a reasonable enlargement of the power of absolute proprietors, and would diminish the inconveniences produced by the technical distinction between inheritance and purchase. This is the case in which we think the distinction between the whole blood and the half blood of the purchaser may be abolished.

"We think that especial regard should be paid to the blood of the first purchaser, in a case which will be liable to occur in consequence of the admission of the half blood to inherit. If an estate should descend from a purchaser to his half-brother, it might happen that the heirs of the second brother would be strangers in blood to the first, and the heirs of the first brother (at the death of the second) strangers in blood to the second; this would be the case if the common parent were illegitimate, and the second brother should die without issue, and there were no other brother or sister, or the issue of such; and it might be the case under other circumstances. We propose to provide for the case by directing the inheritance to pass to the heir of the first purchaser, when the heir of the last proprietor shall not be also heir of the first purchaser.

Heir of first purchaser let in in a certain case.

"We further think that the last proprietor may be treated as if he had been first purchaser, in the rare case in which the line from which the estate descended to the last proprietor has failed, for the purpose of admitting to the inheritance his other relations, rather than let it escheat.

Last proprietor considered as first purchaser on failure of blood of first purchaser.

"It may seem superfluous to legislate for cases like these, which may appear very unlikely to occur in practice; they are found, however, to occur in consequence of the acquisition of estates by persons of illegitimate birth, who have in law no relations but their own descendants, or by the descendants of such, and in consequence of the loss of evidence of pedigree in families of mean condition or origin.

5th. *Seisin of Ancestor.*

Inconveni-
ence of old
law.

"A rule of law, founded on feudal principles, and expressed in the legal maxim, *seisina facit stipitem*, directs, that inheritance is to be traced from the person who last died *actually* seised; that is, who was in possession by himself, or a tenant for years, or had received some rent (in the case of a freehold lease), or had exercised some act of ownership; thus, if the right to an estate descended to a person who himself died without having taken possession, or having had it by construction of law, the inheritance is to be traced not from such person, but from the person who died possessed. This law produces many anomalous consequences: it makes it sometimes a matter of chance whether a whole sister or a half-brother of the person who last died entitled, or whether a father, or an uncle, or more remote relation of the person who last actually enjoyed the property, shall inherit; and it may happen that one part of the family estate, having been in the occupation of a tenant, shall go one way, another part, as to which the possession may have remained vacant during the time of the person last entitled, shall go another way.

Doubtful
questions as
to fact of
reisin.

"Owing to the circumstances that some species of property, as reversions and advowsons, do not admit of taking actual possession, though an act of ownership has the effect of taking possession, and that on the other hand, in most cases which admit of possession, and as to equitable estates, the law creates constructive possession, these anomalies are sometimes inevitable; moreover, occasionally nice and doubtful questions arise as to the fact of actual or constructive possession.

"The rule itself appears not to be grounded on any solid principle, and though the inconveniences arising from it will be lessened by admitting the half blood and the lineal ancestor to inherit, it is proposed to abolish it, and to enact that estates shall pass to the heirs of the person who last died entitled, although he may not have had *seisin*.

[It will be observed that this proposal has not been adopted, and that the descent is to be traced from the purchaser. See sect. 2 of act, and note.]

New laws of
inheritance
to be applied
to copyhold
lands, &c.

"It appears expedient to extend all the above proposed rules to the inheritance of lands held by tenures or customs, different from the general tenure of free and common socage, as copyhold lands and customary freeholds, and lands held in ancient demesne, and borough-english and gavelkind lands, and also to descendible freeholds." (1 Real Property Rep. 10—16.)

Equitable estates are subject to the same rules of descent as legal. (2 P. Wms. 668; 1 Rep. 121 b.; 4 Rep. 22; 2 Eden, 268; 1 Sand. Uses, 217, 3 ed.)

ROOT OF DESCENT.

II. And be it further enacted, that in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, (c) for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.

Descent shall always be traced from the purchaser, but the last owner shall be considered to be the purchaser, unless the contrary be proved.

(c) The explanations in the first section have rendered actual seisin unnecessary in the purchaser or person to be deemed such; but every estate, right, and interest, whether in possession, reversion, remainder, or contingency, (*ante*, p. 425,) and whether the last person who had a right to the land did or did not obtain the possession or receipt of the rents and profits thereof, are now the foundation of a right in the first purchaser, from whom the descent is accordingly to be traced. The second section renders it necessary to prove a descent at every step, in order to exclude the last possessor's title as purchaser; but it does not exclude such proof, and therefore when it can be obtained the descent will be traced as it has actually taken place, subject to the provisions of the act. (See 2 Sugd. V. & P. 230, 10th ed.)

The descent of an estate in remainder or reversion, or by executory devise, will be analogous to the descent of an estate taken by descent from a purchasing ancestor. It will therefore descend to the heirs of the original remainder-man or reversioner, in a course of devolution corresponding to that in which the latter descends to the heirs of the purchasing ancestor, and with a corresponding difference from the manner and principles of a descent of such an estate at common law; that is to say, it is the fact of purchase that constitutes the person the stock of descent under the new law, and not the fact of seisin, or what may be equivalent to seisin as under the old law. Any partial disposition, therefore, of the remainder or reversion, or other act of ownership exercised by the mean owner, which under the old law would, in such a case, be considered

as equivalent to seisin, and sufficient to turn the descent, will not of itself have that effect under the new law. But if the conveyance by which the disposition is made should contain an express limitation of the fee to the mesne owner himself or his heirs, he would then, under the 3d section of the act, acquire by means of the conveyance, a new estate by purchase in the remainder or reversion, which would thenceforth be descendible to his own heirs, and not to the heir of the original remainderman or reversioner, or of the last purchaser of the remainder or reversion.

As to rule tracing descents from the purchaser.

Where an illegitimate child became the purchaser of lands which descended to his son, who died without issue and intestate, it was held that the heirs of the party last seised were not entitled; but that notwithstanding the 3 & 4 Will. 4. c. 106, s. 2, the lands escheated to the crown. Thus in 1808 G. N., a foundling, purchased the property in dispute, having previously married M. J., a widow, whose maiden name had been B., and by whom he had one son, G. N. the younger: he died in 1815 intestate, leaving his wife and his son G. N. the younger his survivors. His widow died shortly afterwards, and his son entered into the possession of the property as his father's heir at law. The son never married, and died seised in March, 1834, intestate. Upon his death the defendant took possession of the property, and continued in possession up to the trial. The lessor of the plaintiff claimed as heir at law of the younger N., viz. as grandson of one J. B., who was the eldest brother of M., the wife of the foundling and mother of the younger N. It was held that the property escheated, the 2d section having provided that in future descents shall be traced from the purchaser, and not from the person last seised. (*Doe d. Blackburn v. Blackburn*, 1 Mood. & Rob. 547, *Parks, B.*) The real property commissioners intended to provide for this very case, in order to prevent an escheat, by making the last proprietor (the son in this case) the purchaser, in order to let in his other relations; (1 Real Prop. Rep. 15;) and they introduced a clause in the bill for that purpose, which was struck out. (See 2 Sugd. V. & P. 231, 332, 10th ed.)

By the second section the descent is to be traced from the purchaser, whether that purchaser is the person upon whose death the descent takes place, or an ancestor of that person. In every case therefore of the death of a person entitled to an estate by descent, the heir of such person is passed over, and the heir of the original purchaser must be sought for. To illustrate the effect of this rule in the case of a descent in coparcenary, a case of constant occurrence where the custom of gavelkind prevails, and not unfrequent in descents of land held by the ordinary tenure,—suppose A. to have purchased an estate, and to have died intestate, leaving three daughters, B., C., D., who each take a third by descent; B. then dies, leaving two daughters; under the old law, if B. or either of her two sisters had acquired seisin, her two daughters would

have taken her third between them ; and if neither B. nor her sister had acquired seisin, the descent of the entire estate would, it seems, have been looked upon as remaining open, (though this point is by no means clear,) and B.'s two daughters would have been entitled to a third as before. But under the present law, B.'s share alone is the subject of descent, and it descends to the heir of the purchaser, A. ; that is, it descends to B.'s daughters, as her representatives in coparcenary with C. and D. ; so that B.'s daughters, instead of taking each a sixth, take each an *eighteenth* only. If one of B.'s daughters were then to die, without doing any act to turn the descent, (and until her majority she could do no such act,) her share would be again subdivided, and her own issue would only be entitled to a *one hundred and eighth share* of the original estate. If, under these circumstances, the adult daughters of the original purchaser had settled or sold their shares, the representatives of B. would have lost all chance of receiving any equivalent by descent from them. (See 5 Jurist, 641, 763 ; 23 Law Mag. 279 ; 1 Hayes's Convey. 314, 5th ed. ; 1 Jarm. & Byth. Convey. by Sweet, 139, 140.)

DEVISE TO HEIR—LIMITATION TO GRANTOR.

III. And be it further enacted, that when any land shall have been devised, by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent (d) ; and when any land shall have been limited, by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof. (e).

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

(d) Under the stat. 3 & 4 Will. 4, c. 106, s. 3, an heir to whom lands are devised by the ancestor takes them as devisee to all purposes ; and therefore the pecuniary legatees are not entitled to have the assets marshalled as against him. (*Strickland v. Strickland*, 10 Sim. 374.)

Descent and purchase.

This section of the act is in direct contravention of two old established rules of law, and renders it necessary to bear in mind the distinction between *descent* and *purchase*, the two modes of acquiring property. A title by *descent* is vested in a man by the single operation of law, and by *purchase* by his own act or agreement. (Co. Litt. 18 b.; 2 Bl. Comm. 200, 201.) The latter is thus defined by Littleton, s. 12: "Purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors or cousins, but by his own deed."

Lord Coke states that a purchaser is a law term, and imports any estate which is *not* cast upon a man by act of law, (as descent or escheat,) but which he takes or accepts by conveyance for money or other consideration, *vel alia, quavis forma*, or freely by gift. (Co. Litt. 18 a.)

It was a positive rule of law, that a man could not make his right heirs take by purchase, neither by conveyance at common law, nor by a limitation to uses, nor by devise. (*Countden and Clerk's case*, Hob. 30; *Pybus v. Milsford*, 1 Vent. 372; Co. Litt. 22 b.) The same rule applies to equitable as legal estates, (Watk. Desc. 169,) and to copyholds as to freeholds. (*Roe d. Noden v. Griffith*, 4 Burr. 1952; *Thrustout d. Gower v. Cunningham*, 2 Bl. R. 1048; Fearn, 68.) The difference between the acquisition of an estate by descent and by purchase consists principally in two points: 1st, That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity. 2d, An estate taken by purchase will not make the person who acquires it answerable for the acts of his ancestors, as an estate by descent. (Cruise's Dig. tit. 30, s. 4.)

Devise to heir void.

Before the passing of this act it was a rule of law, that where a testator made the same disposition of his estate as the law would have done if he had been silent, the will being unnecessary, was void. (See 4 Real Prop. Rep. 74, 75.) Therefore, if a person devised his lands to his heir at law in fee, it was inoperative, and the heir took by descent, as his better title; so where a man, seised of land in fee on the part of his mother, devised it to the heir on the part of his mother in fee, the heir was in by descent. (*Reading v. Royston*, 1 Salk. 242; S. C. Prec. Ch. 222; 2 Lord Raym. 829; Com. R. 123; S. P. 2 Leon. 11; Dyer, 124 a; Plowd. 545; 2 Ves. & B. 190.) Where a devise of lands to the heir at law made no alteration in the nature or limitation of the estate, the heir took not by purchase under the will, but by his preferable title by descent, notwithstanding the will imposed some pecuniary charges on the estate. (*Clarke v. Smith*, Com. 72; *Allen v. Heber*, 1 Bl. R. 22; *Emerson v. Inchbird*, 1 Ld. Raym. 728; *Plunket v. Penon*, 2 Atk. 292.) Thus where a man, seised in fee on the part of his mother, devised to his executors for sixteen years for payment of his debts, remainder to his heir on the part of

his mother, it was held that the heir took by descent. (*Hedger v. Rowe*, 3 Lev. 127; see 2 Wms. Saund. 8 d.) And an heir at law was held to take by descent under a devise to him after the death of his mother, charged with the payment of sums of money. (*Chaplin v. Leroux*, 5 Maule & S. 14.) So under a devise to one for life or in tail, with remainder to the right heirs of the testator, immediately upon his death the heir took the reversion by descent, and not under the will. (Hob. 30; 10 Rep. 41; Ventr. 372.) So a devise to the heir at law in fee, with an executory devise over in case he did not attain the age of twenty-one years, was held not to alter the quality of the estate, which he would otherwise have taken as heir; and that he therefore took by descent, and not by purchase. (*Doe d. Pratt v. Timins*, 1 B. & Ald. 530; see 1 Powell on Devises, by Jarman, 408—429; *Langley v. Snayd*, 7 Moore, 165; S. C. 3 B. & B. 243; *Manbridge v. Plummer*, 2 M. & Keen, 93.) A testator, by his will dated in 1809, devised his real estates to trustees, in trust to pay an annuity, and out of the residue of the rents to maintain S. M. (who was his heir) until he attained twenty-one; and on his attaining twenty-one, to convey the estates to him in fee; but if he died under twenty-one, then to J. S. in fee. S. M. having attained twenty-one, it was held that he took the estate by descent. (*Wood v. Skelton*, 6 Sim. 176.) So a devise after limitations in strict settlement, in default of such issue then to the deviser's next heir at law, was held a limitation of the reversion, and not a contingent remainder to the heir as a purchaser at the time of the failure of such issue. (*O'Keefe v. Jones*, 13 Ves. 413.)

But where a different estate was devised than would have descended to the heir, the disposition by will prevailed, as where the estate was devised to the heir in tail. (Plowd. 545.) So where a man having issue two daughters, who were his heirs, devised to them and their heirs, they took under the will, for by law they would have taken as coparceners, but by the will the estate was given to them as joint tenants. (Cro. Eliz. 431; Com. R. 123; 2 Ld. Raym. 829; *Scott v. Scott*, 1 Eden, 461, 462, n.; S. C. Amb. 383; see 6 Sim. 185; *Swaine v. Burton*, 15 Ves. 371.)

(c) By a well known rule, called the rule in Shelley's case, (1 Rep. 93.) it was established, that where the ancestor, by any gift or conveyance, takes an estate for life, and in the same conveyance, an estate is limited either immediately or mediately to his heirs in fee or in tail, the word *heirs* is a word of limitation of the estate, and not of purchase. Where the subsequent limitation to the heirs follows immediately the estate for life, it then becomes executed in the ancestor, forming, by its union with the estate for life, one estate of inheritance in possession; but where such limitation is mediate and another estate intervenes, it is then a remainder vested in the ancestor who takes the freehold, not to be executed until after the determination of the preceding mesne estate. (1 Barn. & C. 243;

Reversion.

see *Fearne*, 28—201.) In order to understand this section of the act, it is necessary to observe, that when a person has an interest in lands and grants a portion of that interest, or, in other terms, a less estate than he has in himself, the possession of these lands will, on the determination of the granted interest or estate, return or revert to the grantor. (*Com. Dig. Estate*, (B. 10, 11, 12, 31); 2 *Bl. Comm.* 175; *Co. Litt.* 22 b.; *Plowd.* 151; *Watk. on Conv.* 120.) An estate in reversion is therefore the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted by him; (*Co. Litt.* 22;) or the returning of the land to the grantor or his heirs after the grant is over. (*Id.* 142.) A reversion is never created by deed or writing, but arises from construction of law, whereas a remainder can only be limited by deed or some other assurance. It is a rule that a grantor cannot enable his heir general to take a remainder as purchaser, under a limitation to his heirs, but where the limitation is to the right heirs of the grantor, the use so limited is construed to be the old use, and will be executed in him as the reversion in fee, and not as a remainder. (1 *Rep.* 129 b. 130; *Godolphin v. Abingdon*, 2 *Atk.* 57.) As where a man granted to A. B. with remainder to his own heirs male, such heirs took by descent. (*Wills v. Palmer*, *Bl. R.* 687; 5 *Burr.* 2615.) Before the above act it was a general rule, that where a party seized in fee conveyed lands to the use of himself for life, with remainder to others for particular estates for life or in tail, with an ultimate limitation to the right heirs of the grantor, such limitation was inoperative, as he continued seized of the reversion as part of his former estate, which was consequently descendible in the same line as it would have been if no such conveyance had been made. (*Read v. Morpeth*, *Cro. Eliz.* 321; *Moore*, 284; 2 *Rep.* 91 b.) So where a man seized in fee levied a fine to the use of himself and his wife for life, remainder to the use of the right heirs of the settlor, the ultimate limitation did not create a remainder, but the interest undisposed of remained in the grantor as part of the reversion, as if that limitation had been omitted. (*Bingham's case*, 2 *Rep.* 91.) This doctrine is exemplified by the case of *The Marquis of Cholmondestey v. Clinton*, (2 *Mer.* 173; *S. C.* 2 *B. & Ald.* 625; 2 *Jac. & Walk.* 1; 1 *Dow, N. S.* 299; 4 *Bligh, N. S.* 1;) where the Earl of Orford, in a conveyance to uses, reciting that he was desirous that certain estates derived from his mother's family should remain in the family and blood of Samuel Rolle, his maternal grandfather, in consideration of natural love and affection to his relations, the heirs of S. Rolle, and to the intent that the said estates might continue in the family and blood of his late mother, on the side of her father, settled them to the use of himself for life, remainder to the heirs of his body, for default of such issue as he should appoint, and for default of appointment to the use of the right heirs of S. Rolle; and at the time of the settlement, the Earl

of Orford was himself the right heir of S. Rolle; it was held, that this ultimate limitation did not give an estate by purchase to the heir of S. Rolle, but that the estate, on the death of the settlor without issue, descended on his heirs general. (See *Lects v. Southwood*, 1 My. & Cr. 411.)

If a man, seised as heir on his mother's side, made a feoffment in fee to the use of himself and his heirs, the use being a thing in confidence would have followed the nature of the lands, and would have descended to the heir on the part of the mother. (Co. Litt. 13 a.; *Godbold v. Freestons*, 3 Lev. 406.) And it was the same if the limitation had been by fine and recovery; it was still the ancient use; and there was no difference whether upon the conveyance of an estate any part of the use resulted by implication of law, or whether it was reserved by express declaration to the party from whom the estate moved. (*Abbot v. Burton*, Salk. 590. See *Stringer v. New*, 9 Mod. 363.) But that rule held only where lands came by descent, and not where a person took by purchase. But as by a common recovery suffered of an estate tail, the recoverer acquired an absolute estate in fee simple, derived out of the estate tail; if a tenant in tail by purchase under a marriage settlement, made by his ancestor *ex parte maternâ*, with the reversion in fee by descent *ex parte maternâ*, suffered a common recovery to the use of himself in fee, such estate would have descended to his heirs general *ex parte paternâ*; for the recovery did not let in the reversion in fee, but a new estate was thereby acquired by purchase, totally different from the old estate. (*Martin v. Strachan*, Str. 1179, Nolan's ed.; S. C. Willes's Rep. 444; 1 Wils. 66; 6 Br. P. C. 319; 5 Term Rep. 104.) The last rule was held to be applicable to copyholds. (*Roe d. Crow v. Baldwin*, 5 Term Rep. 104.) But if a tenant in tail by purchase, with the reversion in fee *ex parte maternâ*, levied a fine, the land descended to his maternal heirs; (*Simmonds v. Cudmore*, Salk. 338; 1 Show. 370;) for the tenant in tail, by levying a fine, acquired a base fee, which merged in the reversion, of which the tenant was seised *ex parte maternâ*, and descended in the same line. One of two parceners aliened his moiety in fee, whereby the alienee and the remaining parcener became tenants in common; afterwards, by deed of partition between the alienee and the remaining parcener, the land was divided by metes and bounds, and each of them took a moiety in severalty. The question was, whether by that deed the parcener took anything as purchaser, so as to break the descent *ex parte maternâ* and to let in the heir *ex parte paternâ*, on the death of the parcener. It was admitted, that if the deed of partition had been between the parceners themselves, the descent would not be broken. (Com. Dig. Parcener, C. 15.) It was held that the line of descent through the second parcener was not broken by the conveyance, but that his moiety passed to the

Alteration of
line of de-
scendant.

heirs *ex parte maternâ*. (*Doe d. Crosthwaite v. Dixon*, 5 A & Ell. 834; 1 Nev. & P. 255.)

Where a man has an equitable estate *ex parte paternâ* or *parte maternâ*, and afterwards, by descent or otherwise, acquires the legal estate, the equitable estate will merge in the legal, and the descent will be according to the legal title. (*Goodright v. Wells*, Dougl. 771, 2nd ed.; *Wade v. Page*, 1 Br. C. C. 363; *Selby v. Alston*, 3 Ves. 339; *Lyster v. Mahony*, 1 Drury & Warren, 243; and see *Goodright v. Searcy*, 2 Wils. 29; *Goodtitle v. White*, 1 New Rep. 383; 15 East 174; 3 Prest. Conv. 325, 340.)

But where an infant died seised of an equitable estate which had descended *ex parte maternâ*, his incapacity to call for conveyance of the legal estate, (by which the course of the descent might have been broken,) was held not a sufficient reason to induce the court to consider the case as if such conveyance had actually been made; it not being, according to the terms of the trust, any part of the express duty of the trustees to execute such a conveyance. (*Langley v. Sneyd*, 1 Sim. & Stu. 45.)



LIMITATION TO HEIRS AS PURCHASERS.

Where heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

IV. And be it further enacted, that when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land. (f)

(f) When the words "heirs male of the body," &c. operate as words of purchase, that is, when they do not attach in the ancestor, but vest in the person answering the description of such special heir, they appear to have a sort of equivocal or mixed effect. For though they give the estates to the special heir originally, and not through or from his ancestor, yet the

state which he so takes has such a reference to the ancestor, as to pursue the same course of succession, in the same extent of duration or continuance through the same persons, as if it had attached in and descended from the ancestor. (Ferne Cont. Rem. 80.) Thus under a limitation to the heirs male of the body of B. (where no estate is in or given to B. himself) though it originally attaches in his heir male under that special description, and so far operates as words of purchase, yet it not only gives such heir an estate in tail male, without any express words of limitation to the heirs male of his own body, but such an estate tail as will, on failure of his issue male, go in succession to the other heirs male of the body of B. in the same course as if the estate tail had descended from B. himself. (*Mandeville's case*, Co. Litt. 26. See *Southcot v. Stowell*, 1 Mod. 226, 237; 2 Mod. 207, 211; *Wills v. Palmer*, 5 Barr. 2615; 3 C. 2 Bl. R. 687.)

BROTHERS AND SISTERS.

V. And be it further enacted, that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descendant from a brother or sister shall be traced through the parent. (g)

Brothers, &c. shall trace descent through their parent.

(g) Before this act the descent between brothers and sisters was considered as immediate; and in making out their title to each other, the common father need not have been named, although living, but the descent between them was exactly the same as if he had been dead. (Watk. Desc. 111, n.; *H. Chitty on Desc.* 64, 354; *Collingwood v. Pace*, 1 Ventr. 413; *Bridg. by Bann.* 410.)

LINEAL ANCESTORS ADMITTED.

VI. And be it further enacted, that every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote

Lineal ancestor may be heir in preference to collateral persons claiming through him.

lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue. (h)

(h) Under this section, if a son purchase an estate and die without issue, leaving a father and also brothers and sisters, the father will take in preference to the brothers and sisters. (See 2 Sugd. V. & P. 240—243, 10th ed.)

Old rule excluding the ascending line.

It was an old maxim of law, that an inheritance might lineally descend but not ascend. (3 Rep. 40 a.) The parent therefore could never take immediately by descent from the child, but the land would rather have escheated. (*Cowper v. Cowper*, 2 P. Wms. 666.) Though a father or mother could not inherit as such from their child who died without issue, or brother or sister, yet a father or mother before this act might have inherited as *cousin* to their child; as where a son died seised in fee of land without issue, brother or sister, but leaving two cousins his heirs at law, one of whom was his own mother, it was held that she might take as heir to her son in the capacity of his cousin. (*Eastwood v. Vincke*, 2 P. Wms. 613.) So if a son purchased lands and died without issue, his uncle would have had the land as heir, and not the father, though the father was nearer of blood; (Litt. s. 3;) but if in that case the uncle acquired actual seisin and died without issue, while the father was alive, the latter might then by that circuitry have had the land as heir to the uncle, though not as heir to the son, because he came to the land by collateral descent, and not by lineal ascent. (Craig. de Jur. Feud. 234; Wright's Ten. 182, n. (z).) So the father might have taken by purchase as the nearest of blood to his son, as if a lease were made to the son for life with remainder to his next of blood in fee, the father was capable of taking such remainder by purchase, though he could not have taken it by descent from his son. (Co. Litt. 10 b.; 3 Rep. 40 a.)

MALE LINE.

The male line to be preferred.

VII. And be it further enacted and declared, that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descend-

ants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

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MOTHER OF MALE PATERNAL ANCESTOR.

VIII. And be it further enacted and declared, that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants. (i)

The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

(i) This statute has declared the law to be in accordance with the position laid down by Mr. J. Blackstone, 2 Comm. 238. We hold the law to have established that where the consanguinity has to be made out on the paternal side of the ancestors of the party, the more remote branch must be exhausted before recourse is had to the less remote. The point, though formerly much doubted, has been considered settled ever since the time of Sir W. Blackstone. (Per *Tindal*, C. J., in *Davies*, dem. *Lowndes*, ten. 7 Scott, 56; 5 Bing. N. C. 169.) It was decided, that where a person seized of an estate *ex parte maternâ* died without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor could inherit, however nearly related to the *propositus ex parte maternâ*. (*Hawkins v. Shewen*, 1 Sim. & Stu. 257. See Hale's Hist. C. L. by Runn. 2 vol. 120.)

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ADMISSION OF HALF BLOOD.

IX. And be it further enacted, that any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such

Half blood, if on the part of a male ancestor, to inherit after the whole blood

of the same degree; if on the part of a female ancestor, after her.

relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother. (k)

Exceptions to the rule excluding the half blood.

(k) The old rule of law, which excluded the half blood from taking by descent, was subject to some exceptions and qualifications, to which it will be proper to advert. As the descent from the parent to daughters was *immediate*, daughters by different venters might have inherited together as one heir to their common parent, although they could not inherit to each other. (Harg. Co. Litt. 14 a, n. (5).) Thus, Lord Hale says, all the daughters, whether by the same or divers venters, do inherit together to the father. (Hale's C. L. c. 11.) Therefore, if A. marries B., who dies leaving issue a daughter, and A. afterwards has issue one or more daughters, by C. his second wife, and dies; all these daughters shall take his estate in equal shares as coparceners. So all the daughters by different wives succeed to the inheritance of which their father was either seised in his own right, or to which their father would have been heir had he survived the person last seised. And the daughters by several husbands succeed in the same manner to the inheritance of their mother. (See Watk. on Desc. 159, n. (b); H. Chitty on Desc. 78, 79.) So also in the case of *estates tail*, the half blood coming within the description of the entail might inherit as effectually as the whole blood, for they do not claim as heirs of the person last seised, but of the original donee. (Plowd. 57; 3 Rep. 42; *Goodtitle v. Newman*, 3 Wils. 526.) In *titles of honour* also, half blood is no impediment to the descent; but a title can only be transmitted to those who are descended from the first person ennobled, or the person who is made the stock of descent. (Co. Litt. 15 b; 3 Rep. 42 a; Cruise's Dig. tit. xxvi. c. 3, s. 8—11.)

A brother or sister of the half blood is entitled to share personal estate equally with one of the whole blood, inasmuch as they are both equally near of kin to the intestate. (Wms. Executors, 916, 929.)

By stat. 1 Jac. 2. c. 17, s. 7, it is provided, "that if after the death of a father, any of his children shall die intestate without wife or children, in the lifetime of the mother, every

brother and sister, and the representatives of them, shall have an equal share with her." Under that act, the brothers and sisters of the half blood of an intestate are equally entitled with brothers and sisters of the whole blood to share with their mother, after the death of the intestate father, in the personal property of the intestate dying without wife or children. (*Leaupp v. Watson*, 1 Mylne & Keen, 665.) So a posthumous brother of the half blood will take, under the statute of distribution, a share of the intestate brother's personal estate. (*Barnet v. Mann*, 1 Ves. sen. 156.)

According to the custom of descent in the manor of *Taunton Deane* a surviving sister is not entitled to inherit in preference to a son of a deceased brother's son. (*Locke v. Colman*, 2 My. & Cr. 635.) If a man takes through his father by devise, which is now made to invest him with the character of purchaser (sect. 3), the estate on his death, intestate and without issue, will go to his sisters of the whole blood, in exclusion of the brothers of the half blood, and so in the ascending scale to his aunt of the whole blood in preference to his uncle of the half blood; whereas, if the estate had descended to him from his father, who was the purchaser (which, but for this statute, it would have done, although devised to him), the brother of the half blood would, under the act, have been preferred to the sisters of the whole blood, whilst the father's sisters of the whole blood would have taken before his brother of the half blood. (2 Sugd. V. & P. 336, 10th edit.)

Before the above act, a man, in order to qualify himself to take by descent, must have shown that he was heir of the person last seised of the actual freehold and inheritance. (Co. Litt. 11 b, 15 d; 3 Bos. & P. 648; *Jenkins v. Pritchard*, 2 Wils. 45.) Thus, if A. dies, leaving a son and daughter by one venter, and a son by another, and the son by the first venter becomes actually seised and dies, his sister shall be heir to him; but if he had died without having acquired the seisin, the son by the second venter would have taken as immediate heir of his father, to the exclusion of the sister. (Co. Litt. 15; Sir W. Jones, 361.) The entry of the heir upon any part of the estate will give him actual seisin of all the lands in the same county. But where the lands lie in different counties, there must be an entry in each. The entry of the heir, in order to acquire seisin, is only necessary where the lands are in the actual occupation of the ancestor at the time of his death. For if the lands are held under a lease for years, and the lessee has entered under the lease, the heir will be considered as having actual seisin, before entry or receipt of rent, because the possession of the lessee is his possession. (Co. Litt. 15 a; 3 Wils. 521; 7 T. R. 390, 398; Id. 213; see *Bushby v. Dixon*, 3 B. & C. 304.) But where freehold leases are outstanding, the elder brother must obtain possession by the receipt of rent or other acknowledgment in order to acquire seisin, for otherwise the descent would have been to the

Seisin of ancestor.

younger brother of the half blood in preference to the sister of the whole blood. (8 T. R. 211; 7 T. R. 386; Co. Lit. 15 a; Jenk. 242.) Where A. died, leaving two infant daughters by different venters, it was held that an entry by the mother of the youngest daughter as her guardian in socage, constituted a sufficient seisin in the eldest infant daughter to carry the descent of her moiety on her death to her heirs, the possession of one parcener being the possession of the other, so as to create a seisin in the other, and carry her share and descent to her heirs. (*Doe v. Keen*, 7 T. R. 386.)

We have already seen, that by stat. 3 & 4 Will. 4, c. 27, s. 12 (*ante*, p. 164), the possession of one coparcener is not to be that of the other, which it is presumed will be applicable to cases of descent.

In *Cunningham v. Moody*, 1 Ves. sen. 174, where the limitation was to husband and wife for their joint lives, remainder to the children of the marriage in tail, and for default of such issue, to the right heir of the husband in fee; the husband had one daughter of the marriage mentioned in the settlement, and another daughter of a second marriage; and upon the death of the first daughter without issue, the question was, whether her sister of the half blood was entitled to the reversion in fee. Lord Hardwicke held, that as the reversion which descended upon the eldest sister was never clothed with possession, it was governed by the rule *possessio fratris de feodo simplici facit sororem esse heredem*, and would descend to the sister of the half blood. Where a testator devised all his lands to S. A. (his son by his first wife) when he should come to the age of twenty-one years, but if he should die before twenty-one years, and D. A. (the testator's daughter by his second wife) should be then living, he gave the same to her when she should attain twenty-one years. The testator died, and then S. A. died under age and without issue. It was held that on the death of S. A. the inheritance vested in D. A., his sister of the half blood, in preference to his uncle of the whole blood, because S. A. did not die seised of such an estate in fee as would descend upon his heir of the whole blood, but only of an estate expectant upon the life estate of his sister. (*Doe d. Andrew v. Hutton*, 3 Bos. & P. 643; see *Goodtitle d. Vincent v. White*, 15 East, 174; *Goodtitle d. Castle v. White*, 2 Bos. & P. N. R. 388.) And where a posthumous son was born, and his mother was in possession of the lands whereof his father died seised, she became his guardian in socage; and the infant son having died very young, was considered to be actually seised of the inheritance, so as to exclude his sisters of the half blood. (*Goodtitle d. Newman v. Newman*, 3 Wils. 516.) But if a man purchased a reversion expectant upon a freehold, it will descend to his heir, though it has never come into possession. (Harg. Co. Litt. 14 a, n. 6; 3 Bos. & P. 648, 650.)

We have already seen (*ante*, p. 425), that this act applies to descendible freeholds, the descent of which to heirs was

before governed by the same rules as prevailed in cases of estates of inheritance. (*Gravenor v. Brooke*, Poph. 32.) The rule of *possessio fratris* applied to estates *pur autre vie*, the receipt of the rent of lands held for lives by the step-mother of an infant, is a sufficient seisin to entitle his sisters of the whole blood in exclusion of a brother of the half blood. (*Long d. Macartney v. Myles*, Fox & Smith, Ir. Rep. 1.) And the rule was applicable to copyholds. (4 Rep. 21.) Where the guardian of an infant entitled to a descendible freehold for lives *ex parte maternâ* renewed the lease on the death of a life, it was held that the new lease being considered as a new acquisition, would descend to the heirs *ex parte maternâ*. (*Pierson v. Shore*, 1 Atk. 479.)

The above instances will show the necessity, in cases not within the new rules, of inquiring on the investigation of titles, where any children of the half blood have been passed over in a pedigree in favour of the collateral relations of children of the whole blood, whether the latter were *actually seised*, and of requiring evidence of such actual seisin. So on the other hand, where children of the half blood have been admitted, some evidence should appear to show the failure of the issue of the whole blood without having acquired any seisin.

ATTAINED BLOOD.

X. And be it further enacted, that when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of January, one thousand eight hundred and thirty-four. (1)

After the death of a person attainted, his descendants may inherit.

(1) Persons attainted of high treason or felony were incapable of inheriting lands or of transmitting them by descent to their posterity. (Co. Litt. 8 a, 391 b.; Cro. Car. 566.) Another consequence of such an attainder was the corruption and extinction of all hereditary blood in the person attainted; by which he was rendered not only incapable of himself inheriting, or of transmitting his own property by heirship, but he also obstructed the descent of lands to his posterity, in all cases where they were obliged to derive their title through him

The effect of attainder.

from any remote ancestor; and therefore a general heir could not derive a title through an attainted person where there was corruption of blood. (11 Rep. 1 b.; Co. Litt. 391 b. See Yorke: Law of Forfeiture, 72, 4 ed.; 2 Bl. Comm. 251; 4 Id. 388; Bl. Considerations on the Law of Forfeiture for High Treason; Bac. Abr. Forfeiture; Burn's, J., Forfeiture.) But where the party attainted need not be mentioned in the pedigree as between two sons of an attainted father, there was nothing to hinder one brother from inheriting to the other, since the descent was immediate, as he could make himself heir to the person last seized, without mentioning the father. (1 Vent. 413; York's Law of Forfeiture, 83, 4th ed.)

There was a material difference between the case of a fee tail and a fee simple, which was, that notwithstanding the forfeiture of lands entailed by an attainer, yet the blood of the attainted person was not corrupted so as by any consequential disability to affect the issue in tail. Therefore, if the son of the donee in tail was attainted of treason during the life of the father, and died, leaving issue, and then the father died, the estate would descend to the grandchild, notwithstanding the attainder, for he claimed *per formam doni*. (*Dowrie's case*, 3 Rep. 9 b.; York's Law of Forfeiture, 81, 82; Br. Descend, pl. 1; Bro. Forfeiture, pl. 37; *Mantell v. Mantell*, Cro. Eliz. 28; *Sheffield v. Ratcliffe*, Godb. 305; Hob. 347.)

If a copyholder be attainted of treason or felony, his copyhold is immediately forfeited to the lord. (Hawk. P. C. b. 2, c. 49, s. 7.) But by the custom of some manors, the son may inherit from his father notwithstanding the attainder of the latter. (1 Watk. on Cop. 326.)

By the stat. 54 Geo. 3, c. 145, it is enacted, that no attainder for felony after the 27th July, 1814, except in cases of the crime of high treason, or of the crimes of petit treason or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheritance of any heir, nor to the prejudice of the right or title of any person or persons other than the right or title of the offender or offenders during his, her, or their natural lives only, and that it shall be lawful for every person or persons to whom the right or interest of any lands, tenements, or hereditaments after the death of any such offender or offenders, should or might have appertained, if no such attainder had been, to enter into the same. (See Hans. Parl. Debates, 27 vol. pp. 527—536.)

COMMENCEMENT OF ACT.

Act not to extend to any descent before January, 1834.

XI. And be it further enacted, that this act shall not extend to any descent which shall take place on the death of any person who shall die before

the said first day of January, one thousand eight hundred and thirty-four.

XII. And be it further enacted, that where any assurance executed before the said first day of January, one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January, one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made, shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January, one thousand eight hundred and thirty-four. (m)

Limitations made before the 1st Jan. 1834, to the heirs of a person then living shall take effect as if this act had not been made.

(m) Dates must be attended to for an heir to take by descent from a person who died before the 1st January, 1834, and an heir to take by *purchase* under a deed executed before the 1st January, 1834, or the will of a testator who died before that day, (whether as to the heir taking by purchase, the ancestor was living on or after the same day or not) must be traced according to the old law. (1 Hayes' Conv. 320, 5th ed.)

THE LAW OF ESCHEAT AND FORFEITURE.

4 & 5 WILLIAM IV. c. 23.

*An Act for the Amendment of the Law relative to
the Escheat and Forfeiture of Real and Personal
Property holden in Trust. (a)*

[27th June, 1834.]

DEFINITIONS.

WHEREAS great inconvenience has been found to result to persons beneficially entitled to real or personal property by the escheating or forfeiture thereof to his majesty, to corporations, to lords of manors, and others, in consequence of the death without heirs, or the conviction for treason or felony, of a trustee in whom or in whose name the same is vested: And whereas it is expedient that the same should be remedied: And inasmuch as, in order to avoid repetition, certain words are used in this act as describing subjects, some of which, according to their usual sense, such words would not embrace; for the understanding of the sense attached to them in this act, be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the provisions of this act shall extend to and include the several estates and persons, matters and things hereinafter mentioned; (that is to say,) those relating to land, to any manor, messuage, tenement, hereditaments, or real property, whether freehold, customary-hold, copyhold, or of any tenure whatever; those relating to chattels, to personal property of every description capable of

Description
of estates and
matters in-
cluded in the
provisions of
this act, and
construction
of terms used.

being transferred or disposed of otherwise than in books kept by any company or society, or to any share thereof or interest therein; those relating to stock, to any fund, annuity, or security transferable, in books kept by any company or society established or to be established, or to any money payable for the discharge and redemption thereof, or to any share or interest therein; those relating to dividends, to interest, or other annual produce; those relating to a conveyance, to any lease and release, surrender, or other assurance of real property, including all acts and deeds necessary for making and perfecting the same; those relating to an assignment, to any surrender, delivery, or other disposition of the personal property, and to all acts, deeds, and things necessary for making and perfecting the same; those relating to a transfer, to any payment or other disposition of stock; those relating to an heir, to any devisee or other real representative, by the common law, or by custom, or otherwise; and those relating to an executor, to any administrator or other personal representative; unless there be something in the subject or context repugnant to such construction; and whenever this act, in describing or referring to any trustee or other person, or any trust, land, stock, conveyance, assignment, transfer, grant, matter, or thing, uses the word importing the singular number or the masculine gender only, the same shall be understood to include and shall be applied to several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, and several trusts, lands, stocks, conveyances, assignments, transfers, grants, matters, or things respectively, as well as one trust, land, stock, conveyance, assignment, transfer, grant, matter, or thing respectively, unless there be something in the subject or context repugnant to such construction.

(a) This act of parliament appears to have originated from Objects of a representation of the hardships experienced by some indi- the act.

viduals whose stock, standing in the name of *Mr. Fawntleroy*, who was attainted and executed for forgery, was forfeited to the crown. (Parl. Debates, Feb. 1834; 21 vol. 3rd series, p. 246.)

One object of this statute, where a trustee or mortgagee dies *without heirs*, is to enable the Court of Chancery to order the estate to be conveyed according to the provisions of the stat. 11 Geo. 4 and 1 Will. 4, c. 60, ss. 8, 9, 11, superseding the necessity of an inquisition finding the right of the Crown and a subsequent grant by it. Another object is to prevent the *escheat* and forfeiture of lands and chattels on the attainder of a trustee or mortgagee.

Origin of
escheat.

Escheat, derived from the French word *eschet* or *échet*, is a technical term, signifying, properly, when by accident the lands fall to the lord of whom they are holden. (Co. Litt. 13 a, 92 b.) *Escheat*, being a consequence of tenure, is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means; as if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony, whereby formerly every inheritable quality was entirely blotted out and abolished, although now the descendants of persons attainted may inherit. (3 & 4 Will. 4, c. 106, s. 10; *ante*, p. 449.) In such cases the lands *escheated*, or fell back to the lord of the fee; (Co. Litt. 13;) that is, the tenure was determined by breach of the original condition expressed or implied in the feudal donation. In the one case, there were no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, showed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject, and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequence of which in both cases was, that the gift, being determined, the land resulted back to the lord who gave it. (2 Bl. Comm. 72.) The law of *escheat* is founded upon this single principle, that the blood of the person last seised in fee simple, is, by some means or other, utterly extinct and gone; and since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feudal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given. (2 Bl. Comm. 245. Sullivan's Lect. 382.)

Causes of
escheat.

Escheats are commonly divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*; the one sort, if the tenant die without heirs; the other, if his blood be attainted. (Co. Litt. 13, 92.) The first may happen when the tenant dies without any relation on the part of any of his ancestors, or

when he dies without any relations on the part of those ancestors from whom his estate descended; and as to descents, before the 1st of January, 1834, when he died without any relations of the whole blood, although we have already seen (*ante*, p. 445,) that after that period the half-blood are capable of inheriting.

It was held that if a man devises that his executors shall sell his lands, and afterwards dies without heirs, so that his lands escheat to the Crown, the authority given to the executors shall bind the land into whose hands soever it comes. (*Goodcheap's case*, mentioned 1 Leon. 280; *Bate v. Amherst*, Sir T. Raym. 83; *Chotmley's case*, 2 Rep. 53.) The power of sale given to the executors by will, which took effect before office found, divested the imperfect title of the Crown, and overrode and prevented the escheat. (Co. Litt. 241 a; *Nichols v. Nichols*, Plowd. 477; Com. Dig. Prerogative, 89, (D). See 3 M. & Keen, 406.)

Escheat prevented by power of sale in a will.

A monster, which hath not the shape of mankind, but in any part bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage; but although it hath deformity in any part of its body, yet if it hath human shape, it may be heir. (Co. Litt. 7, 8; 2 Bl. Comm. 246.)

Bastards, who are such children as are neither born in lawful wedlock, nor within a competent time after its determination, are incapable of being heirs, or of having any, except of their own bodies. Therefore if a bastard purchases land and dies seised thereof, without issue and intestate, the land will escheat to the lord of the fee. (Co. Litt. 244; 2 Bl. Comm. 247—249.) In the case of a divorce *a mensâ et thoro*, if the wife has children they are bastards, for the law will presume the husband and wife to have conformed to the sentence of separation. (1 Salk. 123; *Sidney v. Sidney*, 3 P. Wms. 275.) But, on a voluntary separation by agreement, the law will *prima facie* presume access, until the contrary be proved by evidence. (*Pendril v. Pendril*, cited 3 P. Wms. 276; Co. Litt. 244.) A divorce cannot however be prosecuted after the death of the parties, nor the marriage be questioned in order to bastardize the issue. (1 Salk. 121; *Harris v. Hicks*, 1 Salk. 548; Carth. 271. See H. Chitty on Descents, 17—31; Shelford on Law of Marriage and Divorce, p. 484.)

No person is capable of inheriting lands unless he be a natural-born subject, or naturalized by act of parliament, or made a denizen by the king's letters-patent. An escheat therefore may sometimes happen on account of there being no descendants but aliens. By the common law every person born out of the king's dominions or allegiance was deemed an alien. But by stat. 25 Edw. 3, st. 2, children born abroad may inherit, if at their birth both their parents are within the king's allegiance, and their mothers pass the sea with the

Aliens.

licence of their husbands. In consequence of the statutes 7 Ann, c. 5; 4 Geo. 2, c. 21; 13 Geo. 3, c. 21; all persons born out of the king's allegiance, whose fathers and grand-fathers were natural-born subjects, are held to be natural-born subjects, and as such are capable of inheriting. By 11 & 13 Will. 3, c. 6, natural-born subjects may derive a title by descent through their parents, though aliens; but the 25 Geo. 2, c. 40, confines the benefit of the former statute to such heirs as shall be living and capable of taking at the death of the person last dying seized, unless such heirs happen to be daughters, and there is afterwards a son or another daughter; in which cases the statute makes special provision. (See 3 Cruise's Dig. 320, 321; Harg. Co. Litt. 8 a, notes; H. Chitty on Descents, 31—40; Com. Dig. Alien (C. 1.); 2 Bl. Comm. 249.) Children born in the United States of America since the recognition of their independence in 1783, of parents born there before that time, and continuing to reside there afterwards, are aliens, and cannot inherit lands in this country. (*Doe d. Thomas v. Acklam*, 2 B. & C. 779; 8 C. 4 Dowl. & Ry. 394.) It had previously been decided in the American Courts, that the natives of Great Britain are aliens and incapable of inheriting lands in America. (*Blight's lessee, v. Rochester*, 7 Wheaton's Rep. 535.) A devise of lands was made to English subjects, in trust to sell, and after payment of mortgages, to invest the surplus monies in the funds, in trust for persons, some of whom were aliens: it was held that the Crown was not intitled to the share of the aliens, either in the land or the produce. There had been a decree for sale, which, when complete, the money was the only property. (*Du Hourmelin v. Sheldon*, 1 Beavan, 79); affirmed on appeal by Lord Cottenham, C., 4 Jur. 116.) That an alien cannot compel feoffees to execute a trust, see *King v. Holland*, Aleyn, 14; 1 Roll. Abr. 19 b; Styles, 20, 40, 75, 84, 90, 94, cited 1 Beavan, 90. This doctrine is applicable to a case in which land is given to a trustee, to be held by him in trust for an alien, in which case the alien takes in the land a permanent equitable interest, which might be attended by inconveniences nearly the same as those which are considered to attend a permanent legal interest vested in an alien. (Ib.) An alien resident in England purchased an equitable interest in freehold lands, and also a lease for a long term of years, and afterwards obtained letters of denization, which in terms conferred upon him not only the power of acquiring lands in future, but of retaining and enjoying all lands which he had theretofore acquired: it was held that he had power to devise the freehold and chattel interest in land which he had purchased previously to the letters of denization. By his will he directed all his property to be sold and converted into money, and after charging this mixed fund with his debts and legacies, gave the residue to *aliens resident abroad*, one of whom was his heir at law: it was held, that the rule which is applicable

to charitable bequests, was applicable in such a case; that the interest in land, and the pure personal estate must respectively be valued, and bear their proportions of the debts and legacies; and that the residue of the interest in land belonged to the crown, and the residue of the personal estate to the aliens. (*Fourdrin v. Gowdey*, 3 My. & Keen, 383. See *Shelford on Mortmain and Charities*, pp. 234—238; and on Wills, pp. 146—148.)

An annuity, rent-charge, advowson, &c. granted in fee, do not escheat to the lord on the death of the grantee without heir, but revert to the donor. (1 Roll. l. 27, 30; Com. Dig. Escheat, (A 1).) So if a corporation be dissolved their land does not escheat, but returns to the donor. (Co. Litt. 13 b.; 1 Roll. Abr. 816; 1 Lev. 237; 3 T. R. 241; 3 Burr. 1868.) It is said, however, that where land, rent, &c. is granted to a corporation and their successors, if the corporation grants them over and is dissolved, that they shall not revert to the donor. (*Southwell v. Wade*, 2 Roll. Abr. 65; Poph. 91; Godb. 211; Vin. Abr. Escheat, (A.) pl. 2.) If a man commit felony, and be pardoned before attainder, the land will not escheat. (*Smith's case*, Owen, 87; Com. Dig. Escheat, (A 2).)

In *Fawcett v. Lowther*, (2 Ves. sen. 304,) Lord Hardwicke said, that it had never been determined whether there can be an escheat of an equity of redemption or of a trust. Though it is a considerable argument, that otherwise there would be an end of escheats, because all the lands in England would be soon in trust. *Hale, C. J.*, said, (Hardr. 469,) "There is a diversity between a trust and a power of redemption, for a trust is created by the contract of the party, and he may direct it as he pleases, and he may provide for the execution of it; and therefore one who comes in the *post* shall not be liable to it without express mention made by the party, and the rules for executing a trust have varied, and therefore they only are bound by it who come in in privity of estate; but a power of redemption is an equitable right inherent in the land, and binds all persons in the *post* or otherwise, because it is an ancient right that the party is entitled to in equity. And although by the escheat the tenure is extinguished, that will be nothing to the purpose, because the party may be recompensed for that by the court by a decree for rent, or part of the land itself, or some other satisfaction."

It was decided that the crown, supposed to be entitled by escheat upon the death of the *cestui que trust*, had no equity to compel the heir, having merely a legal estate, to convey. A. being seised in fee *ex parte paternâ*, conveyed to trustees in trust for herself, her heirs and assigns, to the intent that she should appoint, &c. and for no other use, intent, or purpose whatsoever. A. dying without appointment and without heirs *ex parte paternâ*, it was held by the Lord Keeper and the Master of the Rolls, 1st, that the maternal heir was not entitled; 2dly, that there being a *terre tenant*, the crown claiming by escheat,

had not a title by *subpoena* to compel a conveyance from the trustee, the trust having absolutely determined, but no opinion was given as to the right of the trustee. But it was held by Lord Mansfield, C. J., 1st, that the heir *ex parte materna* was not entitled; 2dly, that from the analogy between trusts and legal estates, the crown was entitled by escheat, but that if the conveyance had barred the crown of its right, as between the maternal heir and the trustees, the former was entitled. (*Burgess v. Wheate*, 1 Eden, 177; S. C. 1 W. Bl. 121.) And where a copyhold which had been surrendered to the use of a will was devised to A. and his heirs, in trust for B. and his heirs, upon the death of B. without heirs, it was decided that the heir of the trustee had no equity to compel the lord to admit him, and his bill was dismissed without costs. (*Williams v. Lord Londale*, 3 Ves. 752.) But the Court of King's Bench granted a mandamus to the lord and steward of the manor to admit the heir of the trustee, as he had the legal estate, which was sufficient for the court to act upon in giving him an opportunity of trying his title, which was all the admission would enable him to do. (*Rex v. Cogam*, 6 East, 431.) In the case of fee simple lands, the lord, taking by escheat, is subject to the charges and incumbrances of the tenant, because the tenant has full power to create them without the consent of the lord. But in the case of copyholds and customary freeholds, where the title depends upon admission, the lord taking by escheat is not subject to the charges and incumbrances, or alienation of the tenant, unless by act of admission he has expressly assented to them. (1 W. Bl. 167; 1 Str. 454.) Where a copyhold tenant surrenders the land into the hands of the lord, to the intent that a new tenant may be substituted in his place, subject to the trusts, &c. expressed in a certain indenture, referred to in the surrender; and when the lord admits the new tenant upon such surrender, he is to be considered as thereby assenting to the qualified nature of his tenure, and cannot afterwards claim against those trusts to which he has thus given his consent; whether he were or were not actually acquainted with the nature of the trust contained in the indenture is immaterial. Where the surrender gives him notice of the trusts, it is his duty to inform himself of their nature. Therefore where A., being seised of a copyhold in fee, surrendered it to the use of B. and his heirs, according to the custom of the manor, but subject to the trusts of a certain indenture therein referred to, which were, after giving one year's previous notice, to sell the tenement, to retain out of the proceeds of the sale a sum of 700*l.* and interest, for which the surrender was a security, and to pay the overplus to A.; B. having been admitted, died intestate and without an heir, the 700*l.* with an arrear of interest still remaining due to him, it was held that the lord did not become entitled to the tenement, by reason of the failure of the heirs of B., and that A. had a right to redeem the premises, and upon payment of what was due on the mortgage, to be readmitted as

Lord subject
to tenant's in-
cumbrances.

tenant in fee, according to the custom of the manor, and that the personal representative of B., and not the lord, was entitled to receive the money. (*Weaver v. Mauls*, 2 Russ. & M. 97.)

Where money was directed to be laid out in real estates, on very long terms with limitations applicable to such estates; on failure of heirs, the crown was held to have no equity against the next of kin to have the money invested in real estates, for the purpose of claiming by escheat, the quality of land not having been imperatively fixed on the money; since it might have been invested in land, and continued personalty for the purposes of transmission. (*Walker v. Denne*, 2 Ves. jun. 170.)

The lord who acquires land by escheat is liable to all the incumbrances of the last tenant. (Plowd. 569; Parker, 120; 12 Mod. 558; Wright's Tenures, 117.) Thus, if a person die without heirs, having granted a rent, the lord by escheat will hold the lands subject to such rent; so if he die leaving a widow, she will be entitled to dower; (Br. Dower, pl. 64;) and in the case of a woman, her husband will be entitled to curtesy. (7 Rep. 7 b.)

If a tenant in fee simple make a lease for years, and die without heir, the lord by escheat, it is said, cannot avoid the term, nor is a subinfeudation affected by the escheat of the mesne tenancy. (*Whittingham's case*, 8 Rep. 45 a.; Vin. Abr. Escheat (H).) Even an *interesse termini* is not avoided by escheat; the real lien binding the land. (Litt. s. 66; Co. Litt. 166; 5 Rep. 124 b.) Where a copyhold estate escheats to the lord of the manor, he will hold it, subject to any lease made by the copyholder with the licence of the lord, and also to the freebench of the widow. (*Turner v. Hodges*, Hutt. 102; 1 Bl. R. 167.)

The law seems to have had no regard to the tenant's right to the land, but only to the right of seisin, and therefore in every case where the tenant was seised *de jure*, no escheat could happen on the death of that person without heirs who had undoubted right to the land. (1 Eden, 243.) Therefore, if an infant tenant made a feoffment in fee with livery of seisin *in person*, and afterwards died without heirs, the lord could not claim by escheat; but if the feoffment had been by attorney, as it was void, the land would escheat. (*Whittingham's case*, 8 Rep. 42 b, 45 a.; 3 Bulstr. 273, 274.) So the lord cannot have the benefit of a condition annexed to an estate created by his tenant. (Litt. s. 348.)

A devise by one who dies without an heir, though it only takes effect at the moment of the testator's death, will prevent an escheat. (3 Bulstr. 43; Vin. Abr. Escheat (F) pl. 3; see *ante*, p. 455.) But, where a testator having devised an estate to his wife for life, and directed it after her death to be sold by A. and the money divided, and died without an heir, and A. died before any sale; on a bill by the persons entitled to the money against the Attorney-General, there being no mesne lord, praying to have the will established, and to hold and

enjoy against the crown, or to have the lands sold pursuant to the will, Lord *Hardwicke* refused to grant relief, on the ground that if any thing of the sort could be done, it must be in the Court of Exchequer, which was a court of revenue. (*Reve v. Attorney-General*, 2 Atk. 223. See *Priddy v. Res*, 3 Mer. 97.)

A term of years attendant on the inheritance, whether by express declaration or by implication, is governed by the same rules as the inheritance itself is subject to; therefore it will not be forfeited by the felony of the owner of the inheritance. (*Attorney-General v. Sands*, 3 Ch. R. 19; *Hard*. 488.) But if the inheritance escheat, the term will go with it. (*Thurston v. Attorney-General*, 1 Vern. 340, 357; see 3 Sugd. V. & P. 92, 10th ed.)

The lord taking by escheat is entitled to the benefit of a term attendant on the inheritance, (*Thurston v. Attorney-General*, 1 Vern. 340,) and to the deeds relating to the lands escheated. (Br. Abr. tit. Charters, 39.) In many cases a writ of escheat formerly lay for the lord; (Fitz. N. B. 143, 144; *Roscoe on Real Actions*, p. 34;) but that remedy, as we have already seen, is abolished with other real actions, (*ante*, p. 218,) and for recovering possession of lands which have escheated, resort must be had to the action of ejectment, which must be prosecuted within the time prescribed in other cases, (*ante*, p. 116.) It seems that the bare acceptance of rent from the tenant or disseisor will not bar the right of the lord, but if he accept rent from the heir or feoffee of the disseisor, where the escheat has accrued before the descent or feoffment, that will be a bar. (Co. Litt. 266 a.; Fitz. N. B. 144.)

Right to traverse an inquisition.

Where an estate escheats to the crown, a commission under the great seal is issued to special commissioners to inquire by a jury into the facts, upon which an inquisition will be taken. The subject has a general right to traverse every inquisition, whether it be of escheat or of any other right by which property is found to be in the crown. (Com. Dig. Prerog. (D.) 83, 84; *Ex parte Lord Gwydir*, 4 Madd. 322.) But it seems that a mere trustee has not such right. (*In re Sadler*, 1 Madd. 581.) Upon petition, an order will be made for leave to traverse an inquisition upon a commission of escheat found in favour of the crown. (*Ex parte Webster*, 6 Ves. 609.) In criminal proceedings, if an offender is convicted of felony, on confession, or is outlawed, not only the time of the felony, but the felony itself, may be traversed by a purchaser, whose conveyance would be affected as it stands; and even after a conviction by verdict, he may traverse the time. (*Per De Grey*, C. J. 20 How. St. Tr. 544, n.) In cases of the king's tenants *in capite*, and his other known tenants, where the tenure is on record, the king was entitled to take seisin of the land, and to receive the profits without any office of escheat. (4 Rep. 58; *Plowd.* 229, 481; *Gilb. Exch.* 110; *Kitchen on Courts*, 221.) But it seems that in other cases of escheat the lands do not

vest in the crown until office found, before which they cannot be leased. (*Doe d. Hayne v. Redfern*, 12 East, 96; see post, p. 465.)

The king is entitled by his prerogative to the personal estate of a person who dies intestate, and without any kindred. (Toller's Executors, 107, 108; Com. Dig. Administrator, (A).) Where executors are excluded from taking any beneficial interest, and no relations of the testator can be found, the former are as much trustees for the crown as they would have been for any of the next of kin, if discovered. Thus, where a man, died possessed of leaseholds which he ordered to be sold, and the produce to be paid to a charity, which was prevented from taking by the statute of mortmain, the executor, who had a legacy, there being no next of kin of the testator, was held a trustee for the crown. (*Middleton v. Spicer*, 1 Br. C. C. 201.) Where an intestate leaves a widow, but no next of kin, the widow is not entitled to the whole of his personal estate, but one moiety belongs to her, and the other to the crown. (*Cave v. Roberts*, 8 Sim. 214.) A. B. being entitled to a fund in court, died, and administration was granted to a person as the natural and lawful sister of A. B.; it appearing from the proceedings in the cause that A. B. was illegitimate, the court refused to pay the fund to the administratrix, but directed it to be carried over to a separate account, with directions that it should not be paid out of court without notice to the crown. (*Long v. Wakeley*, 1 Beav. 400.) By a marriage settlement, a fund, the property of the wife, was settled on her and her husband and their issue, and, in default of issue, on the wife's next of kin. The wife, who was illegitimate, died without issue, and her husband administered to her; it was held that the crown was not entitled to the fund, but that it belonged to the husband as administrator to his wife. (*Hawkins v. Hawkins*, 7 Sim. 173.)

Strictly speaking, according to the legal notion of an escheat, it imports something happening, or returning to the lord upon a determination of tenure only; and in this sense all escheats are properly *feudal*, and such lands or tenements as are held immediately of the king, and yet happen to him upon the commission of any *treason*, are not *escheats*, but *forfeitures*, which were given to the king by the common law, (Hale's Anal. 110,) and do not depend upon the law of *feuds* or *tenures*, but upon Saxon laws made long before the introduction of tenures (Wright's Tenures, 117—119.) Forfeiture is twofold: of real and personal estates. First, as to real estates: by attainder in high treason, (Co. Litt. 392; 3 Inst. 319; 1 Hale's P. C. 240; 2 Hawk. P. C. 448, p. 637, 8th ed.) At common law, the only real estate which was forfeited by attainder for treason, was, all the lands of inheritance whereof the offender was seized in his own right, and all rights of entry to lands in the hands of a wrong doer; and under the statutes 26 Hen. 8, c. 13, and 33 Hen. 8, c. 20, such forfeiture was made to ex-

Crown entitled to personality of intestates with no next of kin.

Forfeiture of lands.

tend to estates tail vested in possession; but it had always been held, that neither by common law or statute was a mere right of action to lands in the hands of a stranger, as, for instance, in the hands of a discontinuee, or of the heir of the discontinuee, forfeitable by attainder for treason. (Co. Litt. 348; Com. Dig. Forfeiture, (B 1); 3 Rep. 2, b.) A man forfeits to the king all his lands and tenements of inheritance, whether fee simple or fee tail, and all his rights of entry on lands and tenements which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the crown; and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. (4 Bl. Comm. 381.) Thus a freehold lease for lives belonging to a party found guilty of coining was forfeited to the crown. (*Horton v. Kirton*, 4 Br. P. C. 141; *Lovel's case*, Salk. 85.) It is said (3 Inst. 19, 21,) that the inheritance of things not lying in tenure, as of rent-charges, rent-seck, commons, &c., shall be forfeited to the king by an attainder of high treason, and that the profits of them shall also be forfeited to the king by an attainder of felony during the life of an offender, and that the inheritance should be extinguished by his death; for it cannot escheat, because there is no tenure, nor descend, because the blood is corrupted. (Hawk. P. C. b. 2, c. 49, s. 4; Vin. Abr. Escheat, (A.) pl. 32. See 54 Geo. 3, c. 145; 3 & 4 Will. 4, c. 106, s. 10, and note, ante, pp. 449, 450.) In the case of land, a co-heir who is attainted of felony or treason, forfeits the share descended to him, and that share only. If the other co-heirs sue, and there is a plea in abatement that one of the co-heirs is not joined as a co-demandant, those who are demandants may reply, "that he need not be joined, for that he has committed felony, so that he is no parcener." (Fleta, cap. 48; Per *Tindal, C. J., in re Brays Peerage*, 8 Scott, 121.) An annuity of inheritance is held to be forfeitable for treason as a hereditament; (7 Rep. 34 b.;) but if a copyholder be attainted of high treason, his estate becomes forfeited to the lord of the manor, not to the crown, unless by the express words of an act of parliament. It is the same where the copyholder is attainted of felony. (Hawk. P. C. c. 49, s. 7; Skinn. R. 8; 1 Watk. Cop. 417; 1 Cruise's Dig. 307, 4th ed.) There can be no forfeiture of freehold lands without attainder. (*Steven's case*, Cro. Car. 566; Co. Litt. 13; Plowd. 260, 261,) nor of a copyhold, unless there be a special custom in the manor. (*Rex v. Willes*, 3 B. & Ald. 510; *Jones v. Pavly*, 3 Lev. 263; 2 Ventr. 38.) Before the statute of uses, (27 Hen. 8, c. 10,) the king was not entitled to a use upon an attainder for treason of the *cestui que use*, as is mentioned in the preamble of that act; so that afterwards trusts were, by an analogy drawn from uses, also protected from forfeiture, upon an attainder of the *cestui que trust* for high treason; but by the statute 33 Hen. 8, c. 30, it was enacted, "that if any person shall be attainted or con-

victed of high treason, the king shall have as much benefit and advantage by such attainer, as well of uses, rights, entries, and conditions, as of possessions, reversions, remainders, and all other things, as if it had been done and declared by authority of parliament."

Lord Hale has observed, (1 P. C. 248,) that at the time when that statute was made there could be no use but that which is now called a trust; and although it was determined in *Abington's case* that a trust estate of freehold was not forfeited by attainder of treason, yet that resolution could not be reconciled with the statute 33 Hen. 8, as the uses there mentioned could be nothing but trusts; therefore he was of opinion, that upon an attainder for high treason of the *cestui que trust* of an inheritance, the equity or trust was forfeited, though possibly the land itself was not forfeited. Whatever may be the case in an attainder for high treason, it has been determined that an attainder for felony is not within the statute 33 Hen. 8, (1 Hale, P. C. 360,) therefore, in the latter case, neither the trust nor the land is forfeited, for the trustee continues tenant.

A party being attainted of felony for the murder of his brother, and having a trust of lands held of the king, of which the legal estate was vested in a trustee, an information was preferred in the Exchequer against the trustee to have a conveyance of the legal estate to the king. The court resolved, that although the felon had the trust of the land at the time of his attainder, yet, inasmuch as the trustee continued seised of the lands, and so was tenant to the king, though subject to the trust, yet the trust was not forfeited to the crown, but that the trustee should hold the lands for his own benefit discharged of the trust. (*Attorney-General v. Sands*, Hardr. 488; Sid. 403; 1 Hale's P. C. 249. See 2 Hargr. Jurisc. Exerc. 386.) At common law *cestui que use* for felony or treason did not forfeit the use, for it is only a confidence; but if a trustee of lands committed treason or felony, the lands were forfeited, and the trust extinct, for the king or lord by escheat could not be seised to any use or trust, for they took paramount the confidence. (Vin. Abr. Escheat (C), pl. 19.) But it is said in other cases, that on the forfeiture of lands by the felony of the trustee, (*Geary v. Beacroft*, Carter, 67; but see Lane, 39, 54,) or their escheat by his death without heirs, that equity would grant relief. (*Eales v. England*, Pre. Ch. 200; 1 Eq. Abr. 384, n.; but see 1 Harg. Jurisc. Exerc. 390.) The title deeds of a leasehold estate were deposited with bankers, by way of equitable mortgage for securing the balance of a running account. The party making the deposit was subsequently convicted of felony. A bill was filed by the bankers, claiming to be equitable mortgagees by virtue of the deposit, against the attorney-general for a sale of the property: it was held, that the court had no jurisdiction, the legal estate being in the crown, to decree a sale of the estate, nor any power to compel a conveyance by the crown of the legal estate; but only to declare the plaintiffs, as equitable mortgagees, entitled to hold possession of the property until

the crown should think fit to redeem. (*Hodge v. Attorney-General*, 3 Y. & Coll. 342.) But where the legal estate was not in the crown, the court, at the instance of an equitable mortgagee, decreed a sale as against the crown, which had only an equitable interest, because the court had jurisdiction over those who had the legal estate, and therefore could carry the sale into effect. (*Prescott v. Tyler*, Rolls, 28 June, 1837, 1 Jurist, 470, cited 3 Y. & Coll. 344, 346.) In *Casberd v. Attorney-General*, (6 Price, 411, 478,) an equitable mortgage by deposit was established against the crown, and the debt secured by the deposit was ordered to be paid out of the proceeds of the sale of the estates, which had been sold under an extent in priority to the claim of the crown. The crown may redeem a mortgage on an estate forfeited by the outlawry of the mortgagor for high treason. (*Attorney-General v. Crofts*, 4 Br. P. C. 136. See *Pawlett v. Attorney-General*, Hardr. 465.) The assignee of the crown was allowed to redeem an estate which had been forfeited to the crown by the treason of the mortgagor. (*Lovel's case*, 1 Salk. 85, cited 1 Eden, 210.) Where a bill was brought to redeem a mortgage which had vested in the king by the attainder of the heir of the mortgagee, Sir M. Hale was of opinion that the king could not in equity be compelled to reconvey, but that an *amoveas manum* only lay in such case, and that was all which could be done in case a trustee forfeited his estate. (*Pawlett v. Attorney-General*, Hardr. 467.) Although as between the surrenderor and the surrenderee of copyhold, the latter cannot be prejudiced by any act done by the former subsequently to the surrender, but is entitled to be admitted to the estate free from all means incumbrances, yet the surrenderor, until the admittance of the surrenderee, continues tenant to the land for all purposes of service. (*Rex v. Boughey*, 1 B. & C. 565; *Berry v. Green*, Cro. Eliz. 349; *Fitch v. Hockley*, Cro. Eliz. 441; *Smith v. Triggs*, 1 Str. 490; Vin. Abr. Copyhold (B. b.), pl. 6.) In *Rosd. Jeffereys v. Hicks*, (2 Wils. 13; S. C. 1 Kenyon, 110,) where a surrenderee was convicted of felony and hanged, without admittance, it was held that the lands were not forfeited to the lord, but descended to the heir of the surrenderor, upon the principle that by the surrender nothing vests in the surrenderee nor in the lord; but, until admittance, the estate in law is in the surrenderor. The lord must always have such a tenant of his lands as may be sufficient to answer all demands, and capable of committing forfeitures. (*Peachy v. Duke of Somerset*, 1 Str. 454.) Therefore, where a copyholder in fee surrendered to the use of a mortgagee in fee, upon condition to be void on payment of the mortgage-money and interest, and the copyholder was afterwards convicted of felony, upon which, according to the custom of the manor, the customary lands of the tenant were forfeited; the lady of the manor having refused to admit the mortgagee, it was contended, on the return to a mandamus, requiring her to admit the surrenderee, that either because of the relation of the sur-

render, or because of the lien on the estate or land, or because the surrenderor was not perfect tenant, or because the lord was privy to the condition, the prosecutor was entitled to a peremptory mandamus; and, in answer, that the surrenderor was, until the admittance of the surrenderee, for all purposes tenant to the lord. It was held by the court, that as the surrenderor was tenant for all purposes of service until the admittance of the surrenderee, so he was also tenant for the purpose of forfeiting, and that the latter was not entitled to be admitted. (*Rex v. Mildmay*, 2 Nev. & Mann. 778; S. C. 5 B. & Ad. 254.) So, where a copyhold was surrendered to a mortgagee (who was duly admitted) and his heirs, and no consideration was expressed in the surrender, and the mortgagee died intestate and without an heir, it was held that the lord of the manor was entitled to enter upon the copyhold as an escheat. (*Attorney-General v. Duke of Leeds*, 2 Mylne & K. 343.) Where a copyhold is forfeited, some step must be taken by the lord to vest the estate in him. (*Doe d. Evans v. Evans*, 5 B. & C. 584.) The forfeiture of lands relates back to the time of the treason committed, so as to avoid all intermediate sales and incumbrances, (3 Inst. 211,) but those before the fact; and therefore a wife's jointure is not forfeitable for the treason of her husband, when settled upon her before the treason committed; but her dower is forfeited by the express provision of stat. 5 & 6 Edw. 6, c. 11. And yet the husband shall be tenant by the curtesy of the wife's land, if she be attainted of treason, (1 Hale's P. C. 359.) for that is not prohibited by the statute. (4 Bl. Comm. 382.) In petit treason and felony, the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life, and, after his death, all his lands and tenements in fee simple (but not those in tail) to the crown, for a very short period of time; for the king shall have them for a year and a day, and may commit thereon what waste he pleases, which is called the king's *year, day, and waste*. (2 Inst. 37.) There is no year, day, and waste without attainder. (2 Inst. 55; 4 Bl. Comm. 386; *Rex v. Bridger*, 1 Mees. & W. 148.) This year, day, and waste, are now usually compounded for, but otherwise they regularly belong to the crown; and after their expiration, the land would have naturally descended to the heir, (as to gavelkind tenure it still does,) did not its feudal quality intercept its descent, and give it, by way of escheat, to the lord. These forfeitures for felony do also arise only upon attainder, and therefore a *felo de se* forfeits no land of inheritance or freehold, for he never is attainted as a felon; (3 Inst. 55;) and, for the same reason, his lands do not escheat where he leaves an heir or a will devising them. They likewise relate back to the time of the offence committed, as well as forfeitures for treason, so as to avoid all intermediate charges and conveyances, (4 Bl. Comm. 385, 386,) but it seems doubtful whether there is any such relation in favour of the

lord claiming by escheat. (Prest. Shep. Touchs. 232, 233.) The profits of lands during life are forfeited by misprision of treason, (3 Inst. 218,) and by striking in Westminster Hall, or drawing a weapon upon a judge there sitting in the king's court of justice, (3 Inst. 141; 4 Bl. Comm. 386.) Persons convicted or attainted of treason or felony may purchase for the benefit of the king; (Co. Litt. 2 b.;) but they are incapable of conveying after the offence committed, provided attainder follows. (Co. Litt. 42.) It has been decided that an attainted person can, before office found, convey an interest in his lands which are forfeited to the crown by an attainder of felony, and therefore that an action of ejectment can be maintained upon the demise of such person for the recovery of an estate of freehold, for neither the possession of land nor the right to enter is vested in the crown until office found. (*Doe d. Griffith v. Prichard*, 5 B. & Ad. 765; S. C. 2 Nev. & Mann. 489. See Perkins, Grants, s. 26; Com. Dig. Capacity (D. 6); Shepp. Touch. 232, *Doe d. Evans v. Evans*, 5 Barn. & Cr. 587, note (c); S. C. 8 Dowl. & Ry. 399.) A man in January, 1815, was convicted of bigamy; in April, 1815, he conveyed away, by lease and release, certain lands in which he had a life estate; it was held that such conveyance was not void as against the crown, there having been no attainder. (*Rex v. Bridger*, 1 Mees. & W. 145; 1 Tyrw. & G. 437.)

A sentence of outlawry, upon flight from a charge of felony, does not incapacitate the outlaw from directing (according to the terms of a previously executed trust-deed) the trustees in what mode they shall carry the trust into effect. (*Macras v. Hyndman*, 6 Cl. & Fin. 212.) By stat. 6 Geo. 4, c. 25, s. 1, (see 7 & 8 Geo. 4, c. 28, s. 13,) it is enacted, that where the king shall by warrant under the sign manual, countersigned by one of the principal secretaries of state, grant to any felon without benefit of clergy a free pardon, or a pardon upon condition of transportation, imprisonment, or any other punishment, the discharge out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal as to the felony whereof the offender was convicted. Where a copyholder was convicted of a capital felony, but pardoned upon condition of remaining two years in prison, and the lord did not take any steps for seizing the copyhold; it was held that at the expiration of the two years the copyholder might maintain an ejectment for the land against one who had ousted him, inasmuch as the pardon under the last-mentioned act restored his competency to hold lands, and the estate did not vest in the lord without some act done by him. (*Doe d. Evans v. Evans*, 5 B. & C. 584.) By stat. 2 & 3 Will. 4, c. 62, s. 2, the time within which pardons may be granted by the governors of colonies is limited, and no person sentenced to transportation shall be capable of acquiring or holding any property, or of bringing any action for the recovery of any

property, until after such person shall have duly obtained a pardon from the governor of the colony.

Every description of *personal* estate belonging to a man in his own right, whether in possession or action, is liable to forfeiture to the king, (Staundf. Pr. 45, 46; 12 Rep. 12; Com. Dig. Forfeiture (B. 1.); Hawk. P. C. b. 2, c. 49, s. 9.) Things personal settled in trust are also liable to forfeiture; as if a bond or lease be taken in another's name, in trust for a person who is afterwards convicted of treason or felony, these will be forfeited as much as if taken in his own name (Cro. Jac. 312; Hob. 214.) But those which he has as executor or administrator of another, (Cro. Car. 566,) or a term of years limited to executors, but not vested in the party himself, are not forfeitable. (2 Leon. 5, 6; And. 19; Moore, 100; Dyer, 309, 310.) An attainted person is considered in law as one *civilitur mortuus*. He may acquire, but he cannot retain; he may acquire not by reason of any capacity in himself, but because if a gift be made to him, the donor cannot make his own act void, and reclaim his own gift; and as the donor cannot do this and the attainted donee cannot enjoy the thing given, it vests in the crown by its prerogative, there being no other person in whom it can vest. By attainder all the personal property, and rights of action in respect of personal property, accruing to the party attainted, either before or after attainder, are vested in the crown before office found; and therefore attainder may well be pleaded in bar to an action on a bill of exchange indorsed to the plaintiff after his attainder, (*Bullock v. Dodds*, 2 B. & Ald. 258.) Personal property not belonging to a felon convicted of simple larceny and sentenced to transportation, at the time of his conviction, but accruing due to him afterwards, before his term of transportation has expired, is forfeited to the crown, (*Roberts v. Walker*, 1 Russ. & M. 752.) Goods and chattels are totally forfeited by conviction of high treason or misprision of treason; of petit treason; of felony in general, and particularly of felony *de se*, and of manslaughter, nay, even by conviction of excusable homicide, by outlawry for treason or felony, by conviction of larceny and of several other offences. (See 2 Bl. Comm. 421; 4 Id. 387; Bac. Abr. Forfeiture (B.); Chitty's Crim. L. 730, &c.; Hawk. P. C. b. 2, c. 49, s. 14, &c.) By a bare outlawry, the party immediately forfeits his personal goods, and they are vested in the crown, but he does not forfeit the profits of his lands, nor chattels real, till inquisition taken, and therefore an alienation after outlawry, and before inquisition, is good to bar the crown of the pernanity; but if he makes a feoffment after inquisition, the feoffee has the estate, and the crown shall have the profits. (Bac. Abr. Outlawry (D. 3,) p. 62, 7th ed.) Any one having an estate or right may grant the same over, if his title be precedent to the outlawry. (Ib.) An outlaw cannot appear in court for any purpose but to reverse his outlawry. (*Aldridge v. Butler*, 2 Mees. & W. 412.)

The forfeiture commences from the time of conviction, but Assignments

to defeat
right of crown
void.

an assignment of personal property by a person about to be tried, for the purpose of defeating the interest of the crown, is void within 13 Eliz. c. 5, (Lane, 44, 45; 3 Rep. 82.) A felon or traitor, after the commission of the offence, and before conviction, may sell *bond fide* for his subsistence his chattels real or personal. (Hawk. P. C. b. 2, c. 49, s. 33.) And it seems that an assignment made by a felon on the eve of trial for a capital offence, for good consideration, will be valid, although the object be to avoid a forfeiture, (*Shaw v. Bran*, 1 Stark. N. P. C. 319.) In *Jones v. Ashurst*, (Skinn. 357,) it was held by Holt, C. J. that a bill of sale, made by a man in Newgate, who was afterwards convicted and executed for burglary, of all his goods as a provision for his son, was fraudulent, for though a sale *bond fide* and for a valuable consideration had been good, because the party had a property in the goods till conviction, and ought to be reasonably sustained out of them, yet such a conveyance as that could not be intended for any other purpose than to defraud the king. If a party, being in custody on a charge of felony, convey all his property, in trust for his wife for life, and then in trust for his son, and on the next day be convicted of the felony, this conveyance will be void as against the crown. (*Morewood v. Wilkes*, 6 Carr. & P. 144.) The assignment by a felon of his goods and chattels after the offence committed, and before conviction, depends for its validity as against the claim of the crown, upon the valuable consideration and the *bond fides* of the transaction. (*Perkins v. Bradley*, 6 Jur. 254, V. C. Wigram; see 4 Byth. Conv. pp. 186—191.) The title of the crown to the goods of a *felo de se* accrues on the finding of the felony by the coroner's inquisition. (*Lambert v. Taylor*, 4 B. & C. 150.) A debt or chose in action, vested in the crown on a forfeiture for felony, is assignable at law, and will pass by the king's sign manual, not under the great seal, or any other seal. (*Lambert v. Taylor*, 4 B. & Ald. 150; S. C. 6 D. & R. 188.) A grant of a liberty in a manor of goods and chattels of tenants in such a manor, attainted of felony, is confined to the goods, &c. of felons, being locally situate within the manor, and does not pass goods, &c. lying out of it. (*Rex v. Copper*, 5 Price, 217.)

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COURT OF CHANCERY TO DIRECT CONVEYANCE OF
LANDS VESTED IN TRUSTEE AND MORTGAGEE
DYING WITHOUT HEIRS.

If trustee or
mortgagee of
any land die
without an
heir, the
court of Chan-
cery may
appoint a
person to
convey.

II. And be it enacted, that where any person seised of any land upon any trust or by way of mortgage dies without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey such land in like manner as is provided by the act of the eleventh year of King George the

Fourth, and the first year of his present majesty, intituled, "An act for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees, and for enabling courts of equity to give effect to their decrees and orders in certain cases," in case such trustee or mortgagee had left an heir, and it was not known who was such heir; and such conveyance shall be as effectual as if there was such heir. (b)

(b) A. died intestate, unmarried, and illegitimate, having mortgaged his real estates to B. for 500 years, and having subsequently mortgaged them to B. for an additional sum, by deposit of the title deeds. The fee simple was not worth the mortgage money; it was held, nevertheless, that the mortgagor could not be deemed a bare trustee for the mortgagee within the stat. 4 & 5 Will. 4, c. 23, s. 2, so as to deprive the crown of the equity of redemption; but it was ordered that the estate should be sold in the administration of assets, and B. declared a purchaser, with liberty to apply to the crown for a grant of the fee simple. (*Rogers v. Maule*, 1 You. & Coll. N. C. 4.) Under the stat. 1 Anne, st. 1, c. 7, 34 Geo. 3, c. 75, the crown could make no grants of estates escheated beyond leases for short terms of years or during lives. But by stat. 39 & 40 Geo. 3, c. 88, s. 12 (introduced by Lord Redesdale, 3 Swanst. 466,) after reciting that divers lands, &c. as well freehold as copyhold, had escheated, and might escheat to the crown, it was enacted, that it shall be lawful for his majesty, his heirs and successors, to direct, by warrant under the sign manual, execution of any trusts to which the lands so escheated were liable at the time of the escheat, or to which they would have been liable in the hands of a subject, and to make grants of such lands for the execution of such trusts, and to make grants either for the purpose of restoring the same to the family to whom they had belonged, or for rewarding persons discovering any escheat. By the 47 Geo. 3, c. 24, the powers of the last cited act were extended to lands which had or should come to the king in right of the Duchy of Lancaster, and to such lands as had or should be purchased by or for the use of or in trust for any alien or aliens, and to the arrears of rent of any lands before any grant. The powers of the two last-mentioned acts were further extended by 47 Geo. 3, sess. 2, c. 24, 59 Geo. 3, c. 94, and 6 Geo. 4, c. 17.

Case where mortgagor was held not bare trustee for mortgagee.

Power of crown to direct execution of trusts of lands escheated.

By stat. 11 Geo. 4 & 1 Wm. 4, c. 60, s. 8, it is enacted, "That where any person seised of any land upon any trust shall be out of the jurisdiction of or not amenable to the process of the Court of Chancery, or it shall be uncertain, where there were several trustees, which of them was the survivor, or it shall be uncertain whether the trustee last known to have

When trustees of real estates are out of the jurisdiction, or it is uncertain whether they

be alive, or who may be the heir, the Court of Chancery may appoint a person to convey.

been seized as aforesaid be living or dead, or, if known to be dead, it shall not be known who is his heir; or if any trustee seized as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same; then and in every or in any such case it shall be lawful for the said Court of Chancery to direct any person whom such court may think proper to appoint for that purpose, in the place of the trustee or heir, to convey such land to such person and in such manner as the said court shall think proper; and every such conveyance shall be as effectual as if the trustee seized as aforesaid, or his heir, had made and executed the same."

Decisions on the Trustee Act.

The stat. 11 Geo. 4 & 1 Will. 4, c. 60, applies only to a *cestui que trust* who is named in the instrument upon which his title depends, or to a person who claims directly under a *cestui que trust* so named, as real or personal representative, or as assignee. (*In re Merry*, 1 M. & K. 677). It will be observed that the word *mortgage* does not occur in the 8th section of the trustee act, while in some of the other sections the words *trust* and *mortgage* are both used. It was clear therefore on the face of the act, that the legislature meant to make a marked distinction between a trustee and a mortgagee, and it was decided that the latter did not come within the 8th section. (*Ex parte Payne*, 6 Sim. 645; *Ex parte Stanley*, 5 Sim. 320; 7 Sim. 170.) Therefore where a mortgagee in fee died intestate as to real estate, and his heir was not known, the court decided it had no authority under the 8th section of that act, to appoint a person to reconvey the estate to the party entitled to the equity of redemption, on his payment of the mortgage money to the executor of the mortgagee. (*In re Goddard*, 1 M. & Keen, 25; see *In re Newman*, Law Journ. vol. 13, p. 124; *Prendergast v. Eyre*, 1 Lloyd & G. temp. Sugd. 11.)

Where a testator gave an annuity to his widow, and the residue of his estate to his children, and the executors paid the testator's debts and legacies, and purchased stock in their names, to answer the annuity, and paid the dividends to the widow, one of the executors having gone to reside abroad, and the other died abroad, it was held that they were trustees of the stock within 11 Geo. 4 & 1 Will. 4, c. 60, ss. 10, 22, and the stock was ordered to be transferred into the name of a new trustee. (*Ex parte Dover*, 5 Sim. 500.) A and B. claimed adversely a sum of stock standing in the names of A. and two other persons, as trustees. A. filed an amicable bill, to have the rights and interests of himself and B. declared; A. was beyond sea commanding a merchant vessel, on a voyage to India; B. presented a petition, under 11 Geo. 4 & 1 Will. 4, c. 60, praying that the stock might be transferred into court in

the cause. But the V. C. refused to make the order, saying, that he did not consider the plaintiff to be out of the jurisdiction of the court, and that he thought that the case was not within the meaning of the act, but that, when the plaintiff returned to England, he might join with the other trustees in transferring the stock as desired. (*Hutchinson v. Stephens and others*, 5 Sim. 498.)

The 9th section of the act 11 Geo. 4 and 1 Will. 4, c. 60 provides for the case of trustees of leasehold estates who are out of the jurisdiction, &c.

The 11th section of the same act requires the direction or orders of the Court of Chancery, or by the Lord Chancellor, &c., under the authority of that act, to be made upon petition.

Where a decree had declared a defendant, against whom a bill had been taken *pro confesso*, to be a trustee of stock for the plaintiffs, the court declined to refer it to the master to appoint a person to transfer the stock in the place of the defendant, except upon a petition presented under 11 Geo. 4 & 1 Will. 4, c. 60. (*Fellows v. Till*, 5 Sim. 319.)

The 12th section authorizes the Lord Chancellor or court to direct a bill to be filed, in certain cases, to establish the right.

The stat. 1 & 2 Vict. c. 69, after reciting the stat. 11 Geo. 4 & 1 Will. 4, c. 60, s. 8, 18, and further reciting the stat. 4 & 5 Will. 4, c. 23, s. 2, and that doubts had arisen whether the provisions of the said acts extended to the cases thereafter mentioned, and that it was expedient that such doubts should be removed, enacts—

“That where any person seised of any land by way of mortgage shall have departed this life without having been in possession of such land, or in the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been or shall be paid to his executor or administrator, and the devisee or heir or other real representative; or any of the devisees or heirs or real representatives, of such mortgagee shall be out of the jurisdiction or not amenable to the process of the Court of Chancery, or it shall be uncertain, where there were several devisees or representatives, who were joint tenants, which of them was the survivor, or it shall be uncertain whether any such devisee or heir or representative be living or dead, or if known to be dead it shall not be known who was his heir, or where such mortgagee or any such devisee or heir or representative shall have died without an heir, or if any such devisee or heir

In certain cases to which it is doubtful whether the recited act extends, the Court of Chancery to appoint persons in place of the devisee, heir, &c., to convey land, &c.

or representative shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by, any person intitled to require the same, then and in every such case it shall be lawful for the said Court of Chancery to direct any person whom such court may think proper to appoint for that purpose in the place of the devisee, heir, or representative, (whether such devisee, heir, or representative shall or shall not have a beneficial interest in the money paid to the executor or administrator as aforesaid) to convey such land in like manner as by the said first recited act the said court is empowered to appoint a person to convey in the cases therein mentioned in the place of a trustee or the heir of a trustee, and every such conveyance shall be as effectual as if such devisee, or heir or representative had executed the same." (c)

(c) In *Ex parte Whitton*, 1 Keen, 278, Lord Langdale, M. R. was of opinion that mortgagees and the heirs of mortgagees were within the 8th section of 11 Geo. 4 & 1 Will. 4, c. 60, as explained by 4 & 5 Will. 4, c. 23, s. 2. His lordship afterwards said that the above case was founded on the supposition that the 8th section of the act, taken in connection with the 4 & 5 Will. 4, c. 23, s. 2, applied to mortgagees as well as trustees; but the act 1 & 2 Vict. c. 69, having declared that the stat. 1 Will. 4, c. 60, and 4 & 5 Will. 4, c. 23, should not be construed to extend to any case of mortgagees dying seised of land except those expressly provided for, appeared to him at the same time to preclude the extension of the effect of the 8th section of 1 Will. 4, c. 60, by construction to any other case. Therefore the case of a mortgagee resident out of the jurisdiction is not within the stat. 1 Will. 4, c. 60, 4 & 5 Will. 4, c. 23, or the 1 & 2 Vict. c. 69. (*Green v. Holden*, 1 Beav. 207.)

Although the 3rd section of 1 & 2 Vict. c. 69, provides that the 11 Geo. 4 & 1 Will. 4, c. 60, and the 4 & 5 Will. 4, c. 23, shall not be construed to extend to any case of a person dying seised of any land by way of mortgage, other than such as are in that act expressly provided for, yet that section does not repeal any part of the two other acts, and therefore the cases of a mortgagee dying, leaving an infant heir, or where it is uncertain whether he left an heir, are not affected by the first mentioned act. (*Re Wilson's estate*, 8 Sim. 392.) Where a person has been ordered under 11 Geo. 4 & 1 Wm. 4, c. 60,

s. 8, to convey trust property in the place of a refusing trustee, it is not necessary that he should execute a new deed reciting the order, but he may execute the deed tendered to the trustee, and it should be expressed in the attestation clause, that he has executed it in the place of the trustee, in pursuance of the order. (*Ex parte Foley*, 8 Sim. 395.)

The second section enacts, "That the words used in this act shall have the same effect in England and in Ireland, and shall embrace the same objects as they would have had and embraced if the provision herein before contained had formed part of the said recited acts or either of them."

Act to extend to England and Ireland and to be construed as part of recited acts.

The 3rd section declares, "That the said recited acts or either of them shall not be construed to extend to any case of any person dying seised of any land by way of mortgage, other than such as are hereinbefore expressly provided for."

Recited acts not to extend to any cases of mortgage other than herein provided for.



ESCHEAT NOT TO TAKE PLACE ON ATTAINDER OF TRUSTEE OR MORTGAGEE.

III. And be it further enacted, that no land, chattels, or stock vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to his majesty, his heirs or successors, or to any corporation, lord of a manor or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his co-trustee, or descend or vest in his representative, as if no such attainder or conviction had taken place(c).

Lands, &c. vested in any trustee shall not escheat by reason of the attainder or conviction of such trustee.

(c) On a petition under this act, praying that the court would appoint a person to transfer certain funds standing in the name of Mr. *Fauntleroy* as trustee, and which had been forfeited to the crown by his attainder, and also to authorize the Bank to make the transfer accordingly; it was decided that the proper reference would be to inquire and state whether he was a trustee within the meaning of the 4 & 5 Will. 4, c. 23, and also within the meaning of 11 Geo. 4 & 1 Will. 4, c. 60, (*Anon. Law Journ.* vol. 13, p. 73.) An order was made under this act for a reference to inquire whether a person convicted of felony in the year 1822 was a trustee of stock standing in

References under this section.

Evidence
of no grant
from crown.

his name for the petitioner, and whether any grant thereof had been made by the crown: it was held, not necessary to serve the attorney general on behalf of the crown with notice of the application to the court. (*In re Tyson*, 1 Jurist, 281, C.) In the case of a mere naked trustee, having the legal estate vested in him, the lands do not escheat, but the Court of Chancery, under the provisions of stat. 4 & 5 Will. 4, c. 23, has power to appoint a new trustee in the place of a felon, and all the interests of such felon will become vested in the new trustee. (*Ex parte Tyson*, 1 Jurist, 472, cited 3 Y. & Coll. 344. The affidavit of one of the clerks of the treasury, that he had searched the registry of grants in the office of the Secretary of State, and had found no grant by the crown of the estate of a trustee who had been convicted of forgery, held sufficient evidence of the non-existence of that grant, (*Ex parte Tyson*, 1 Jurist, 472, V. C.)

It had been considered that when land or personal property was vested in several trustees, one of whom was attainted, the whole, at least as to chattels, became forfeited to the crown, inasmuch as the crown could not be a joint tenant with any other person, (Co. Litt. 190 a; *Hales v. Petit*, Plowd. 257; 9 Rep. 129 b; 2 Bl. Com. 409; Cro. Eliz. 263; Finch's Law, 178; 10 Mod. 245.) In such cases, under this section of the act, the property will survive to the other trustee or trustees, but in the case of a sole trustee, it is to remain in him or descend to his representatives; and the act appears to be defective in not having provided any means whereby the estate vested in such trustee shall be transferred, except by the sixth section, which applies only to cases which had occurred before the passing of the act.

ACT APPLIES TO CONSTRUCTIVE TRUSTS, &c.

To whom and
to what cases
the provisions
of this act
shall extend.

IV. And be it enacted, that the several provisions of this act shall extend to every case of a trustee having some beneficial estate or interest in the same subject, or some duty as trustee to perform, and also to every case of a trust arising or resulting by implication of law or by construction of equity. (d)

(d) It has been said, that where a person seised in fee contracted to sell his estate, and died before any conveyance, without an heir, that the court would not compel the lord claiming by escheat to convey to the vendee, upon the principle that he was not compellable in equity to execute a trust. (*Stephens v. Baily*, Nels. R. 107; see *Pawlett v. Attorney-General*, Hardr. 465.) But it seems that if a purchaser, who had paid his money, died without any heir, before the lands had been

conveyed to him, that the lord claiming by escheat could not compel a conveyance, although the consequence would be that the vendor would retain the estate for which he had been paid, as well as the purchase money. (1 Eden, 211.) As to constructive trusts, see *ante*, p. 192.

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BENEFICIAL INTEREST OF TRUSTEE, &C. LIABLE TO
ESCHEAT.

V. Provided always, and be it hereby enacted, that nothing contained in this act shall prevent the escheat or forfeiture of any land, chattels, or stock vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such land, chattels, or stock, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this act had not passed.

This act not to prevent the escheat of any beneficial interest.

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RETROSPECTIVE CLAUSE.

VI. And whereas it is expedient to relieve persons beneficially entitled to real or personal property which has already escheated or become forfeited to his majesty, to corporations, to lords of manors, or others, by any of the means aforesaid; be it therefore enacted, that in all cases where before the passing of this act any person possessed of or entitled to any land, chattels, or stock, or any right to or interest in any land, chattels, or stock, as a trustee thereof, either in whole or in part, or jointly with some other trustee or trustees, shall have died without an heir, or shall have been convicted of any offence whereby the said land, chattels, or stock, or any of them, have escheated or been forfeited, or have become subject to any escheat or forfeiture, then and in every or any such case the said land, chattels, or stock, or the right thereto or interest therein which hath escheated or been forfeited, or become subject to escheat or forfeiture by reason thereof, shall be subject to the

Where any person possessing lands, &c. as a trustee shall have died without heirs, or have been convicted, before the passing of this act, the lands, &c. shall become subject to the control of the Court of Chancery.

Proviso.

order, control, and disposition of the Court of Chancery, for the use of the party beneficially interested therein, in such manner and subject in all respects to such rights and incidents, and to such orders and regulations of the said court, under the provisions of the said act of the eleventh year of King George the Fourth, and of the first year of his present majesty, as if such person so dead without an heir, or so convicted, as aforesaid, were out of the jurisdiction of, or not amenable to the process of the said court, without having been so convicted: Provided always, that nothing in this clause contained shall extend to any land, chattels, or stock now vested in any person by virtue of any grant thereof made subsequently to the time when such escheat or forfeiture first occurred, or to any land, chattels, or stock which more than twenty years prior to the passing of this act shall have been actually vested in possession or reduced into possession by the party entitled thereto by virtue of any such escheat or forfeiture. (e)

(e) The subject of escheat was shortly adverted to by the Real Property Commissioners, (3d Real Prop. Rep. pp. 4, 5.) who submitted certain propositions, of which the following only has been carried into effect:—

“ Land which shall escheat for want of heirs of a trustee or mortgagee, shall continue subject to the trusts or equity of redemption or incumbrances to which it would have been subject if it had not escheated.”

PAYMENT OF DEBTS OUT OF REAL ESTATES.

11 GEO. IV. & 1 WILL. IV. c. 47.

An Act for consolidating and amending the Laws for facilitating the Payment of Debts out of Real Estates.

[16th July, 1830.]

REPEAL OF FORMER ACTS.

WHEREAS an act was passed in the third and fourth years of King William and Queen Mary, intituled "An Act for the Relief of Creditors against fraudulent Devises," which was made perpetual by an act passed in the sixth and seventh years of King William the Third, intituled "An Act for continuing several Laws therein mentioned:" And whereas an act was passed by the parliament of Ireland, in the fourth year of Queen Anne, intituled "An Act for Relief of Creditors against fraudulent Devises:" And whereas an act was passed in the forty-seventh year of his late Majesty King George the Third, intituled "An Act for more effectually securing the Payment of Debts of Traders:" And whereas it is expedient that the provisions of the said recited acts should be enlarged, and that the said recited acts should be repealed, in order that all the provisions relating to this matter should be consolidated in one act; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that

^{3 & 4 W. & M. c. 14.}
^{6 & 7 W. 3. c. 14.}
^{4 Anne, c. 5.}
^(1.)
^{47 Geo. 3. c. 74.}
^{Recited acts repealed.}

the said several recited acts shall be and the same are hereby repealed, but so as not to affect any of the provisions and remedies of the said acts, or any of them, to the benefit of which any persons are entitled, as against any estate or interest in any lands, tenements, hereditaments, or other real estate of any person or persons who died before the passing of this act. (a)

Old rule as to liability of lands to debts.

(a) By the common law, freehold lands of inheritance which descended to the heir were assets for the payment of the ancestor's debts by specialty, as by bond or covenant in which the heirs were named. (1 Str. 665; 4 East, 492.) But the ancestor, by disposing of the land by will, could deprive his creditors of that means of payment as the devisee was neither at law, (4 East, 491; 7 East, 135; 2 Atk. 292, 492; 2 Anstr. 515,) nor in equity, (2 Atk. 432,) liable to the payment of the testator's debts in respect of the land devised. The heir at law also to whom the land descended might have defeated the creditor of his ancestor by aliening the land before suit by the creditors, (1 P. W. 777,) although in equity he appears to have been responsible for the value of the land sold. (Id. 777, 431; see 1 Fonbl. Eq. 283.) To obviate these mischiefs the statute of 3 & 4 Will. and Mary, c. 14, (made perpetual by 6 & 7 Will. 3, c. 14; and extended to Ireland by 4 Anne, c. 5;) was passed, which was repealed and re-enacted by the above act with additional provisions to supply some omissions in the former statute. It must, however, be remembered, that the statutes of 3 & 4 Will. and Mary, c. 14, and 47 Geo. 3, c. 74, are still in force as to persons who died before the 16th July, 1830. The statute of 3 & 4 Will. and Mary, c. 14, was confined to fraudulent devises, and therefore fraudulent conveyances, whether voluntary or not, were not within it. It was decided that if a man made a conveyance of lands in his lifetime, in order to defraud his creditors, and died, his bond creditors had no right to set aside the conveyance; for the statute (it is said) was only designed to secure such creditors against any imposition which might be supposed in a man's last sickness. But if he gave away his estate in his lifetime, this prevented the descent of so much to the heir, and consequently took away their remedy against the heir, who was liable only in respect of the land descended. And as a bond is no lien whatever on lands in the hands of the obligor, much less can it be so, when they are given away to a stranger. (*Parlow v. Weedon*, 1 Eq. Abr. 149, pl. 7; 1 Fonbl. Eq. 286.) This doctrine was much questioned, and when it was first promulgated gave much dissatisfaction. (*Jones v. Marsh*, Forr. 64.) Hence the reason is apparent why voluntary conveyances of lands cannot be set aside, except by creditors

he have reduced their debts to judgment before the death of the party, for until that time they constitute no lien on the land. (1 Fonbl. Eq. ch. 4, s. 12; Gilb. Lex Prætoria, 293, 294; *Colmau v. Croker*, 1 Ves. jun. 160.) A. who was a trader, at his death, indebted by specialty and simple contract, devised freehold estates to his son in fee. The son, on his marriage, settled the estates on his wife and children, and afterwards died: it was held, that the 3 & 4 Will. and Mary, c. 14, and 47 Geo. 3, c. 74, s. 2, did not charge the real assets, descended or devised, with the ancestor's debts, but made the heir or devisee personally liable to the value of the assets, and, therefore, that the son's widow and children were entitled to hold the estates discharged from the debts of the father. (*Spankman v. Timbrell*, 8 Sim. 253.)

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DEVICES TO BE VOID AGAINST SPECIALTY CREDITORS.

II. And whereas it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having by bonds, covenants, or other specialties, bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills, or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, and for the maintenance of just and upright dealing, be it therefore further enacted, that all wills and testamentary limitations, dispositions, or appointments, already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee simple, in possession, reversion, or remainder, or

For remedying frauds committed on creditors by wills.

have power to dispose of (b) the same by his, her, or their last wills or testaments, shall be deemed or taken, (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them, with whom the person or persons making any such wills or testaments, limitations, dispositions, or appointments, shall have entered into any bond, covenant, or other specialty, binding his, her, or their heirs,) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding.

(b) The words "power to dispose of" were held to include leasehold estates *pur autre vie*, and therefore, that a devise of them was void against creditors. (*Westfaling v. Westfaling*, 3 Atk. 460, 465.)

DEVISEES TO BE LIABLE TO SPECIALTY DEBTS.

Enabling
creditors to
recover upon
bonds, &c.

III. And, for the means that such creditors may be enabled to recover upon such bonds, covenants, and other specialties, be it further enacted, that in the cases before mentioned every such creditor shall and may have and maintain his, her, and their action and actions of debt or covenant (c) upon the said bonds, covenants, and specialties against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, or the devisee or devisees of such first-mentioned devisee or devisees jointly (d) by virtue of this act; (e) and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended. (f)

(c) By stat. 3 & 4 Will. and Mary, c. 14, s. 3, the remedy was confined to actions of *debt*, and it was decided that an

action of covenant would not lie against the devisee of land to recover damages for a breach of covenant entered into by the devisor. (*Wilson v. Knubley*, 7 East, 128.) B., as surety for J., became party to an indenture whereby A. leased land to J., at a rent payable by J. for a term determinable on A.'s death; and B. and J. covenanted jointly and severally for themselves and their heirs that B. and J., or one of them or their heirs, executors, &c, should pay the rent reserved, and also a further rent as liquidated damages, if the land were farmed contrary to the covenants of the lease. After B.'s death, rents of both kinds became due: it was held that B.'s devisees were not liable, under the statute 3 & 4 Will. & M. c. 14, to an action of debt for any of the sum due. (*Forley v. Bryant*, 3 Ad. & Ell. 839; 5 Nev. & M. 42.)

(d) The remedy is here extended to the devisees of devisees. (*Westfaling v. Westfaling*, 3 Atk. 460.) Equity followed the rule of law; and therefore, in a bill by a specialty creditor against a devisee under the 3 & 4 Will. and Mary, c. 14, it was decided, that the heir at law (if any) of the testator was a necessary party. (*Gawler v. Wade*, 1 P. Wms. 99; *Warren v. Stowell*, 2 Atk. 125.)

(e) In arranging the funds in equity between the heir and devisee, it is settled that assets descended to the heir must be applied to pay debts before lands can be charged which are specifically devised. (*Chaplin v. Chaplin*, 3 P. Wms. 367; *Pewis v. Corbet*, 3 Atk. 556.)

In the ordinary administration of assets, the first fund applicable to the payment of debts is the personal estate, not specifically bequeathed; then land devised or ordered to be sold for payment of debts, not merely charged; then descended estates; then lands charged with debts. (*Harmood v. Oglander*, 8 Ves. 124; *Milnes v. Slater*, *Ib.* 295.)

(f) The manner of declaring on the statute will be found in 2 Chitty on Pleading, p. 469, 4th ed., p. 304, 6th ed. If in an action by a bond creditor against the heir of an intestate, the latter plead a false plea, the Court of Chancery will, after a decree obtained in a suit by another creditor for the administration of the intestate's assets, restrain the plaintiff at law from taking out execution against the assets, but not from proceeding against the heir personally. (*Price v. Evans and wife*, 4 Sim. 514.) In an action of debt against a devisee on a bond of his testator, in which the question is whether the signature of the testator is a forgery or not, a party entitled, under the testator's will, to an annuity charged on his real estate, is not a competent witness for the defendant. (*Bloor v. Davis*, 7 Mees. & W. 235.)

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Action against Devisee only.

IV. And be it further enacted, that if in any If there is no

heir at law
actions may
be maintain-
ed against the
devisee.

case there shall not be any heir at law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case every creditor to whom by this act relief is so given shall and may have and maintain his, her, and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid.

Act not to extend to Provisions for Payment of Debts.

Not to affect
limitations for
just debts, or
portions for
children.

V. Provided always, and be it further enacted, that where there hath been or shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements, or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, according to or in pursuance of any marriage contract or agreement in writing, *bond fide* made before such marriage, the same and every of them shall be in full force, and the same manors, messuages, lands, tenements, and hereditaments shall and may be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be raised, paid, and satisfied, any thing in this act contained to the contrary notwithstanding. (g)

Devises not
within the
act.

(g) The uniform rule is, that an effectual provision by will for payment of creditors is not fraudulent within the statute, and it makes no difference whether the land be devised to trustees to sell, or descend to the heir charged with debts. (*Mathews v. Jones*, 2 Anstr. 515; *Bailey v. Ekins*, 7 Ves. 323; *Earl of Bath v. Earl of Bradford*, 2 Ves. sen. 590; *Plunkett v. Penson*, 2 Atk. 292; *Shiphard v. Lutwidge*, 8

Ves. 26; *Kidney v. Coussmaker*, 12 Ves. 154.) But if the devise for payment of debts does not provide for it in a practicable manner, the case will not be taken out of the statute. (*Hughes v. Doulben*, 2 Cox, 170; S. C. 2 Br. C. C. 614.) A devise of all the devisor's lands in trust to sell and pay all the testator's debts cannot be sued under the statute 3 & 4 Will. and Mary, c. 14. (*Gott v. Atkinson*, Willes, 521; S. C. Barnes, 164.)

Where a testator devised his real estate to trustees and their heirs, upon trust to sell, and after declaring his will to be that the clear money arising from such sale should sink into and become part of his personal estate, he gave and bequeathed the same and all his effects whatsoever to the same trustees, their executors and administrators, upon trust, after converting the same into money, and paying all his debts, funeral and testamentary expenses, to pay legacies, and dispose of the residue, it was held that the devise was substantially a devise of the real estate for the payment of all debts; and by the 4th section of the statute 3 & 4 Will. & M. c. 14, good against the specialty creditors, and converted the produce into equitable assets. (*Soames v. Robinson*, 1 Mylne & Keen, 500; see *Barker v. May*, 9 B. & C. 489.) A question frequently arises as to what amounts to a charge of debts. In *Graves v. Graves*, 8 Sim. 43, a testator directed all his debts, legacies and funeral expenses, to be paid as soon as conveniently might be after his decease. Afterwards he devoted a particular estate to the payment of his debts, legacies and funeral expenses, in aid of his personal estate, and devised the rest of his estates to his children in strict settlement, it was nevertheless held that all his real estates were charged with his debts. (See *Godolphin v. Penneck*, 2 Ves. sen. 270; *Palmer v. Graves*, 1 Keen, 645; *Douce v. Lady Torrington*, 2 My. & Keen, 600; *Braithwaite v. Britain*, 1 Keen, 206; *Thomas v. Britnell*, 2 Ves. sen. 313; *Shaw v. Berrer*, 1 Keen, 659.)

Although a devise for payment of debts by rents and profits is out of the statute, the court would not be willing to adopt the limited construction of confining it to annual rents and profits; but would, upon a devise of a gross sum out of rents and profits for that purpose, hold that the testator intended the debts to be paid with all practicable speed. (*Bootle v. Blundell*, 19 Ves. 528.) And a direction in a will to pay simple contract before specialty creditors, was held not to be void, as it was within the exception in the statute of fraudulent devises (*Millar v. Horton*, Coop. C. C. 45); but a devise not for the payment of debts generally would not be within the exception. (3 Barnard. 304.) Though the statute of fraudulent devises will prevent a devise for payment of legacies from disappointing creditors by specialty, it would not prevent a devise for payment of debts generally from letting in creditors by simple contract to the prejudice of creditors by specialty. (*Kidney v. Coussmaker*, 12 Ves. 154; 2 Atk. 104.)

HEIR TO BE ANSWERABLE FOR VALUE OF LANDS
ALIENED.

Heir at law
to be answer-
able for debts,
although he
may sell
estate before
action
brought.

VI. And be it further enacted, that in all cases where any heir at law shall be liable to pay the debts or perform the covenants of his ancestors, in regard of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir at law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments, *bonâ fide* aliened before the action brought, shall not be liable to such execution. (*h*)

Extent of li-
ability of heir
to debts.

(*h*) The common law and the statutes 3 & 4 Will. & Mary, c. 14, and 47 Geo. 3, s. 2, c. 74, do not charge the real assets descended or devised with the debts of the ancestor, but make the heir or devisee liable, personally, to answer for the value of the assets. (*Spackman v. Timbrel*, 8 Sim. 259.) An heir taking lands by descent is liable for his ancestor's debts no further than the value of the land descended; therefore if the heir pay his ancestor's debts to the value of the land descended, he may hold the land discharged from the other debts of the ancestor; and if the heir pleads, in an action of debt by a specialty creditor of his ancestor, that he has paid specialty debts to the value of the assets descended, the plea is good on demurrer. (*Buckley v. Nightingale*, 1 Str. 665; *Horn v. Horn*, 2 Sim. & S. 448; see 8 Sim. 259.) But a plea by an heir to an action on his ancestor's bond that he claims to retain a certain sum for money laid out in repairing the premises descended cannot be supported, (*Shetelworth v. Nevill*, 1 T. R. 454,) although it may be otherwise if the repairs were necessary. (*Id.*) The case of an heir at law is not like that of a trustee for the payment of debts, the latter cannot apply the rents and profits to his own use, which must go in diminution of the just debts, but an heir at law is entitled to the rents until judgment is given against him. (1 T. R. 457.)

A specialty creditor has the same right under the bankruptcy of the heir of the debtor, as if he had not become bankrupt; and may therefore follow the real assets or their specific produce in the hands of the assignees. (*Ex parte Morton*, 5 Ves. 449.)

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Plea by Heir.

VII. Provided always, and be it further enacted, that where any action of debt or covenant upon any specialty is brought against the heir, he may plead *riens per descent* at the time of the original writ brought or the bill filed against him, any thing herein contained to the contrary notwithstanding; and the plaintiff in such action may reply that he had lands, tenements, or hereditaments from his ancestor before the original writ brought or bill filed; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or *nihil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands, tenements, or hereditaments so descended. (i)

Where an action of debt is brought against the heir, he may plead *riens per descent*.

(i) In an action against an heir or devisee (see Com. Dig. Pleader (2 E).) the defendant may not only plead any matter which might have been pleaded by the ancestor or deviser, but may also deny the character in which he is sued; or admitting it, may plead that he has *nothing by descent* or by *devise*, either generally (Ibid.) or specially; viz. that he has nothing but a reversion after an estate for life or years, (Com. Dig. Pleader, (2 E 3).) or that he has paid debts of an equal or superior degree, to the amount of the assets descended or devised, or that he *retains* the assets to satisfy his own debt of equal or superior degree, or debts of a superior degree due to third person, (Ibid.; 1 Chitty on Pleading, 4 ed. 431, 432; 2 Id. 468—470; 3 Id. 973, 974; Selw. N. P. Debt, s. 6; 2 Saund. R. 7, n. 4.) To debt against heirs on the bond of their ancestors, the defendants pleaded *non est factum, per fraudem*, and *riens per descent*; and the plaintiff replied, that after the death, &c. and before the commencement of the suit, the defendants had

lands, &c. by descent, &c.; it was held that this was a replication under the stat. 3 & 4 Will. & Mary, c. 14, s. 6, and that the jury, having found that lands descended, ought to have assessed the value of those lands. (*Brown v. Straker*, 1 Cr. & Jer. 583.)

By the New Rules of Pleading, made in pursuance of stat. 3 & 4 Will. 4, c. 42, (2 Crompt. & Mees. 10; 3 Nev. & Mann. 1,) it is (amongst other things) provided that "In debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. The plea of *nil debet* shall not be allowed in any action. In actions of debt on specialty, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance. (2 Crompt. & Mees. 21, 22; 3 Nev. & Mann. 8.)

Devisees to be liable like Heirs.

Devisees to be liable the same as heirs at law.

VIII. Provided always, and be it further enacted, that all and every the devisee and devisees, made liable by this act, shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought.

TRADERS' ESTATES LIABLE TO SIMPLE CONTRACT DEBTS.

Traders' estates shall be assets to be administered in courts of equity.

IX. And be it further enacted, that from and after the passing of this act, where any person being, at the time of his death, a trader within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, or other real estate, which he shall not by his last will have charged with or devised subject to or for the payment of his debts, and which would be assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity for the payment of all the just debts of such person, as well debts due on simple

contract as on specialty; and that the heir or heirs at law, devisee or devisees of such debtor, and the devisee or devisees of such first-mentioned devisee or devisees, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors by specialty in which the heirs were bound: Provided always, that in the administration of assets by courts of equity, under and by virtue of this provision, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands. (k)

Creditors by specialty to be paid first.

(k) This section of the act corresponds *verbatim* with the statute 47 Geo. 3, st. 2, c. 74. In the construction of that act it was held, that a party to come within it must have been a trader at his death. (*Keene v. Riley*, 3 Mer. 436; *Hitchon v. Bennett*, 4 Madd. 180.) It was decided that where a person who was a trader at his death devised his real estates, subject to the payment of legacies, the purchaser of the estate from the devisee was bound to see to the application of his purchase money in satisfaction of the legacies charged on the land, notwithstanding their liability under 47 Geo. 3, stat. 2, c. 74, to the payment of the simple contract debts. (*Horn v. Horn*, 2 Sim. & Stu. 448.) And where real estate is devised subject to debts and legacies, and the devisee is also executor, a purchaser or mortgagee from him of the real estate will be liable to the charge, if the circumstances of the transaction afford intrinsic evidence that the mortgage or purchase-money was not to be applied for payment of the debts and legacies. (*Watkins v. Cheek*, 2 Sim. & Stu. 199.) The bankrupt being entitled to one-third part of freehold property in his own right, and to another third as heir at law to his brother, deposited the title-deeds of the property with his bankers, to secure advances. The personal property of the brother, who was a trader subject to the bankrupt law, was insufficient to discharge his debts, and therefore his third of this property was, under 11 Geo. 4 & 1 Will. 4, c. 47, s. 9, assets for payment of his debts; it was held, nevertheless, that the lien of the bank extended to the two-thirds of the estate, in preference to any claims of the brother's creditors. (*Ex parte Baine*, 1 Mont. D. & G. 492.)

It was held, that persons having prior incumbrances on free-

hold and copyhold estates, of which a trader, who died intestate, was seized at the time of his death, ought not to be made parties to a bill for payment of his debts out of his real estate. (*Parker v. Fuller*, 1 Russ. & Myles, 656.)

An admission of the debt by the personal representative of a deceased trader, was held not to bind a devisee of his real estate, who had made no such admission, as against him it was necessary to prove the original existence of the debt, or an acknowledgment of it by him. (*Putnam v. Bates*, 3 Russ. 188; see *Tullock v. Dunn*, 1 Ryan & Moody, 416; *Tredgold v. Atkins*, 2 Barn. & Cres. 23.) A devisee is not bound by the amount of a claim substantiated against the executor in an action at law to which he was not a party. (*Wilson v. Leonard*, 3 Beav. 373.)

It is in the discretion of the executor or administrator, under ordinary circumstances, to plead the statute of limitations to a debt due by his testator or intestate or not, and if he acts *bona fide* in not pleading it, and pays the debt, the payment will be good. (*Norton v. Frecker*, 1 Atk. 526; *Castleton v. Fenshaw*, Prec. Ch. 100; *Shewen v. Vanderhorst*, 1 Russ. & M. 349; 2 Russ. & M. 75; 2 Wms. Executors, 1262, 1263.) But although the executor is not bound to plead the statute of limitations, yet after a decree in a creditor's suit, the objection may be taken against any other creditors coming in before the master, whose claims are barred by the statute. (*Ex parte Dendney*, 16 Ves. 498.) Such objection may be taken by the residuary legatee, or any other party interested in the fund, before the master, notwithstanding the refusal of the executor. (*Shewen v. Vanderhorst*, 1 Russ. & M. 347.)

PAROL NOT TO DEMUR.

In actions by
or against in-
fants, the
parol shall
not demur.

X. And be it further enacted, that from and after the passing of this act, where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur, but such action, suit, or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of this act be carried on or prosecuted by or against any infant, where, according to law, the parol did not demur. (I)

(I) When in an action or suit the plaintiff or defendant is an infant, in many cases either party may suggest the nonage

of the infant, and pray that the proceedings may be deferred till his full age, or (in the legal phrase) that the infant may have his age, and that the *parol may demur*; that is, that the pleadings may be stayed; and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby. (3 Bl. Comm. 300; 2 Inst. 257, 291.) But this privilege was always confined to an infant *heir*, to whom lands had come by descent from the specialty debtor, and did not extend to an infant devisee who was sued for a specialty debt under 3 & 4 Wm. & Mary, c. 14. (*Plasket v. Beeby*, 4 East, 485.) The parol demurred in equity in those cases only in which it would have demurred at law. (*Price v. Carver*, 3 My. & Cr. 162.) Where the heir was an infant a doubt was expressed whether a decree for sale, under the 47 Geo. 3, stat. 2, c. 74, could be made during his infancy, as the parol might demur. (*Lechmere v. Brasier*, 2 Jac. & Walk. 187. See *Scarth v. Cotton*, Jac. R. 635, n.) All cases of foreclosure and partition, and all others in which a conveyance is required from an heir, except those in which the parol would demur at law, are cases in which a day is given to show cause against the decree. The above statute affords no remedy in such cases, except that by the 11th section it enables the Court to take from the infant the legal estate of property decreed to be sold for the payment of debts, but for that purpose only. In other cases in which a conveyance is required from an infant, the law remains as it was before. Therefore a decree of foreclosure against an infant must give the infant a day to show cause against the decree after he attains twenty-one, notwithstanding the 10th and 11th sections of the above statute. (*Price v. Carver*, 3 Mylne & Cr. 157; *Scholefield v. Heafield*, 7 Sim. 669; see *Powys v. Mansfield*, 6 Sim. 637.)

Where a decree has been made against an infant defendant who put in the common answer by his guardian, the general rule is, that such defendant on coming of age has the privilege of putting in a new answer, stating a different case, and of going into evidence in support of that case. This privilege does not extend to foreclosure suits. (*Kelsall v. Kelsall*, 2 M. & Keen, 409.) In a foreclosure suit, a day having been given by the decree to the infant defendant, the heir of the mortgagor, to show cause against it, the court made an order under stat. 11 Geo. 4 & 1 W. 4, c. 47, s. 11, directing an immediate conveyance to the purchaser by the infant. (*Flood v. Sutton*, 1 Flan. & Kelly, 179.)

After a decree and order in further directions in a suit by creditors, the plaintiffs discovered that there was an infant tenant in tail of the deceased's real estates in existence, who was born prior to the filing of the bill. On the hearing of a supplemental suit, by which the infant was first brought before the court, the accounts were directed to be taken over again as against the infant, with liberty to the master to adopt any of the accounts before taken, if he should find it beneficial to the

infant so to do. (*Baillie v. Jackson*, 10 Sim. 167.) In a suit for administering the property of a person deceased, if an infant defendant is interested in the real estates, the court will not direct those estates to be sold, until the accounts of the personal estate have been taken, and the cause heard for further directions. (*Baillie v. Jackson*, 10 Sim. 167.)

CONVEYANCES BY INFANTS.

Infants to
make convey-
ances under
order of the
court.

XI. And be it further enacted, that where any suit hath been or shall be instituted in any court of equity, for the payment of any debts of any person or persons deceased, to which their heirs or heirs, devisee or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years. (m)

(m) An application under this section for an infant heir or devisee to convey must be made by petition, and not by motion. (*Anon.* 1 Y. & Coll. 75.) An infant devisee in tail may be ordered to convey under this section, (*Penny v. Pretor*, 9 Sim. 135;) and the conveyance must be made by the proper assurance which by law is now required for a tenant in tail. (*Radcliffe v. Eccles*, 1 Keen, 130.) This section of the act extends to a case where the decree for sale of the estate was made prior to the act. (*Chapman v. Tennant*, 2 Russ. & Mylne, 74.) Where a testator devised his estate to two persons as tenants in common in fee, and one

f them died after the testator, leaving an infant heir; in a creditors' suit, after a decree for sale of the estate, the infant heir was ordered to join in the conveyance to the purchaser under this section of the act. (*Brook v. Smith*, 2 Russ. & Wylde, 73.)

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CONVEYANCES BY PERSONS HAVING LIMITED INTERESTS.

XII. And be it further enacted, that where any lands, tenements, or hereditaments, hath been or shall be devised in settlement by any person or persons whose estate under this act, or by law, or by his or their will or wills, shall be liable to the payment of any of his or their debts, and by such devise shall be vested in any person or persons for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person or persons from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise, and a decree shall be made for the sale thereof for the payment of such debts or any of them, it shall be lawful for the court by whom such decree shall be made, to direct any such tenant for life, or other person having a limited interest; or the first executory devisee thereof, to convey, release, assign, surrender, or otherwise assure the fee simple or other the whole interest or interests so to be sold to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment, or other assurance, shall be as effectual as if the person who shall make and execute the same were seized or possessed of the fee simple or other whole estate so to be sold. (n)

Persons having a life interest may convey the fee, if the estate is ordered to be sold.

(n) It had been decided that where it is necessary to resort to the real assets of a deceased debtor for payment of his debts, the court might direct the money to be raised by mortgage instead of sale, and might also direct the infant heir or devisee of the debtor to convey the estate to the mortgagee. (*Holme v. Williams*, 8 Sim. 567.) In *Smethurst v. Longworth*, 7 Law

Journ. N. S. Chanc. 18, it was held that the court was not authorized to direct a mortgage of an infant's estate for payment of the ancestor's debts.

Recited provisions of 11 Geo. 4 and 1 Will. 4, c. 47, extended to authorize mortgages as well as sales of estates.

Surplus of money arising from such sale or mortgage to descend in the same manner as the estates so sold or mortgaged would have done.

The stat. 2 & 3 Vict. c. 60, after reciting the 11th and 12th sections of the stat. 11 Geo. 4 and 1 Will. 4, c. 47, and that doubts were entertained whether the above sections authorized courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, or of lands, tenements, or hereditaments so devised in settlement as aforesaid, and also to authorize such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest, or such first executory devisee as aforesaid, is an infant, enacts, "That the said hereinbefore recited provisions of the said act shall extend and the same are hereby extended to authorize courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, and also of lands, tenements, or hereditaments so devised in settlement as aforesaid, and to authorize such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest, or such first executory devisee as aforesaid, is an infant."

The second section enacts, "That when any sale or mortgage shall be made in pursuance of the said recited act or this act, the surplus (if any) of the money raised by such sale or mortgage which shall remain after answering the purposes for which the same shall have been raised, and defraying all reasonable costs and expenses, shall be considered in all respects of the same nature and descend or devolve in the same manner as the estate, or the lands, tenements, or hereditaments so sold or mortgaged, and shall belong to the same persons, be subject to the same limitations and provisions, and be applicable to the same purposes as such estate or such lands, tenements, or hereditaments would have belonged and be subject and

applicable to in case no such sale or mortgage had been made.

IRELAND.

XIII. And be it further enacted, that nothing in this act shall extend or be deemed or construed to extend to repeal or alter an act made by the parliament of Ireland, in the thirty-third year of the reign of King George(o) the First, intituled "An Act for the better securing the Payment of Bankers' Notes, and for providing a more effectual Remedy for the Security and Payment of the Debts due by Bankers." (p)

Not to repeal
Act 33 Geo. 1,
(1.) relating
to debts due
to bankers.

(o) The following words are here omitted by mistake: "the Second, intituled An Act for repealing an act passed in this kingdom in the eighth year of the reign of King George."

(p) By the 3d section of the Irish stat. 33 Geo. 2, c. 14, all dispositions after 10 May, 1760, by bankers of real or leasehold estates, or any interest therein, to or for any children or grandchildren of any banker, are void against creditors, though for valuable consideration, and though not creditors at the time.

PAYMENT OF DEBTS OUT OF REAL ESTATES.

3 & 4 WILLIAM IV. c. 104.

An Act to render Freehold and Copyhold Estates Assets for the Payment of Simple and Contract Debts.*

* Sic.

[29th August, 1833.]

Freehold and copyhold estates in all cases to be assets for the payment of simple contract or specialty debts.

WHEREAS it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by

specialty in which the heirs were bound : provided always, that in the administration of assets by courts of equity under and by virtue of this act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands. (a)

(a) The stat. 3 & 4 Will. 4, c. 104, makes freehold estates subject to simple contract debts, which were before subject to specialty debts ; but it applies only to estates which the testator has not charged or devised subject to the payment of his debts. All estates subject to the payment of debts will not be liable to be sold without the intervention of a court of equity ; and the rule that a charge of debts is equivalent to a trust to sell for the payment of debts, leaves the distinction between estates subjected to the payment of debts by the will of the debtor, and estates subject to debts by the operation of the law precisely as it was before that act. (*Ball v. Harris*, 4 My. & Cr. 264.)

A testator, after bequeathing a number of pecuniary legacies to different persons, and giving a certain field to his godson, directed that all his debts and the above legacies should be paid and discharged within six months after his decease ; and all the rest and residue of his estate, both real and personal, he gave to N. The personal estate proving insufficient to pay the debts and legacies, it was held, upon demurrer to a bill by some of the legatees seeking to charge their legacies on the real estate, which passed under the residuary devise to N., first, that there was no equity in favour of pecuniary legatees to have the assets marshalled, so as to throw the debts on the real estate devised to N. ; but secondly, that both the debts and legacies were, by the words of the will, effectually charged upon that estate. In this case it was contended, that as the will was executed subsequently to the passing of the act 3 & 4 Will. 4, c. 104, and as every testator must be presumed to be cognizant of the law, the testator knew that his debts were chargeable by statute on his real as well as on his personal estate, and of course, therefore, when he made his will, meant that, in the event of the personalty proving insufficient to answer both his debts and legacies, the former should be thrown upon the real estate. It was said, however, by Lord Cottenham, C., that he could not feel justified in departing from the rules established in the cases which preceded the 3 & 4 Will. 4, c. 104, on account of the very beneficial provisions of that act. To do so would create great confusion, and much uncertainty and litigation ; and the provisions of that act could have no bearing upon the construction of a

charge of legacies; and, indeed, as to debts, a charge by the will was not inoperative in consequence of that act. (*Mirhouse v. Scaife* 2 My. & Cr. 695, 698, 708.)

It has been already stated, that under the stat. 3 & 4 Will. 4, c. 106, s. 3, (*ante*, p. 437,) an heir to whom lands are devised by his ancestor takes them as devisee to all purposes. Where real estates are devised to the heir, although for certain purposes he takes by descent, yet, as between him and the devisees of other parts of the testator's estates, the estates devised to the former are not to be applied in payment of the debts in priority to the estates devised to the latter, though the creditors of a testator have a right to resort to the estate devised to the heir, in priority to the other devised estates, yet the heir is entitled to contribution from the other devisees to the extent to which his estate may be exhausted by debts. (*Biederman v. Seymour*, 3 Beav. 368.)

Where a party dies without heirs, and his land escheats to the lord, it is applicable to payment of debts under the stat. 3 & 4 Will. 4, c. 104, but whether it is so applicable in priority to estates specifically devised seems to be questionable. (*Evans v. Brown*, 6 Jur. 380.)

To a suit for administering the real assets of a testator, under 3 & 4 Will. 4, c. 104, the heir, as well as the devisee, is a necessary party. (*Brown v. Weatherby*, 10 Sim. 125, overruling *Weeks v. Evans*, 7 Sim. 546.)

Simple contract debts, what.

Before this act, lands were not liable to the payment of simple contract debts, except those of traders by stat. 47 Geo. 3, st. 2, c. 74; and 11 Geo. 4 & 1 Will. 4, c. 47, (*ante*, p. 486, 487.) Debts by simple contract are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal promise. It is easy to see in what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. (2 Bl. Comm. 465.)

A person who was a lunatic, but had not been found to be so by inquisition, died seised of a small freehold estate, but not possessed of any personal property. His step-father had received the rents of the estate, and had expended more than the amount of them in maintaining the lunatic; he also paid the lunatic's funeral expenses. It was held, that he was not entitled under 3 & 4 Will. 4, c. 104, to be paid either the surplus expenditure, or the amount of the funeral expenses out of the lunatic's freehold estate. (*Carter v. Beard*, 10 Sim. 7.) See *Rogers v. Price*, 3 Y. & Jerv. 28, where it was held that an executor, who has assets sufficient for the purpose, is liable, upon an implied promise, to pay for a funeral suitable to the degree of his testator, furnished by the direc-

ons of a third person. In *Wentworth v. Tabb*, (1 Y. & Coll. J. C. 171,) it was decided that in the case of necessities supplied to a lunatic, the law raises a contract by implication on be part of the lunatic, under which the amount of such necessities may become payable as a debt out of his real or personal assets, on a bill filed for the administration of those assets. (See *Manby v. Scott*, 1 Sid. 112; *Baxter v. Earl Portsmouth*, 7 D. & R. 614; 5 B. & C. 170; *Brown v. Jodrell*, 3 Carr. & P. 30; *Mood. & M.* 105; *Dane v. Lady Kirkwall*, 8 Carr. & P. 679. See *Shelford on Lunatics*, 407—414.)

A trustee who has committed a breach of trust by misapplying the trust fund, is considered only as a simple contract debtor to his *cestui que trust*, (*Vernon v. Vaudry*, 2 Atk. 119; *Cox v. Bateman*, 2 Ves. sen. 19; see *Perry v. Philips*, 4 Ves. 116.) But an acknowledgment by a trustee under his hand and seal, that he alone had received the whole trust money for the purposes of the trust, (*Gifford v. Manley*, Cas. temp. Talbot, 109,) or any general words amounting to a covenant on his part, will make him a debtor by specialty; and in equity, undertaking to perform the trusts is equivalent to executing the deed. (*Lord Montford v. Lord Cadogan*, 19 Ves. 638.) Before this act freehold estates were not assets for the payment of simple contract creditors, (8 Ves. 384,) although in some cases they acquired a right against the real estate by marshalling. (12 Ves. 154.) The principle of marshalling was, that a person who had two funds to which he might resort for payment of a debt, should not by his choice disappoint another who had only one, but the latter should stand in the place of the former. (*Trimmer v. Bayne*, 9 Ves. 209.) This rule was applied where a person had a double fund to resort to, and another person had a demand upon one fund only, in which case the court turned the person having the double fund upon that which was not liable to the other person's demand, in order to leave that fund open to the latter. (*Att. Gen. v. Tyndall*, Ambl. 615.) And therefore, if a mortgagee exhausted the whole personal estate in payment of his debt, the simple contract creditors of the mortgagor were entitled to stand in the place of the mortgagee against the freehold estate, for the proportion of the mortgage which had been paid out of the personal estate. (*Aldrich v. Cooper*, 8 Ves. 391.) And where it is necessary for the payment of creditors, that the mortgagee of freeholds and copyholds should be compelled to take his satisfaction out of the latter, and he takes it out of the former, those creditors who are thereby disappointed may stand in his place as to the copyhold estate, (*Aldrich v. Cooper*, 8 Ves. 382,) although the mortgage of the copyhold was distinct from, and subsequent to, the mortgage of the freeholds. (*Gwynne v. Edwards*, 2 Russ. 289.) So also legatees were entitled to stand in the place of specialty creditors, who were

Copyholds
heretofore
not liable to
debts.

paid out of the personal estate, against estates descended, but not against specific devisees, unless the estates were devised subject to debts or a mortgage. (8 Ves. 396, 397.)

Formerly copyholds were not liable to an extent; (Park. R. 195; *Drury v. Man*, 1 Atk. 96;) and neither the crown nor the subject was allowed to take copyhold tenements held in fee or for lives in execution, (8 Ves. 394,) yet it was said that leases for years of copyhold tenements granted by virtue of a licence from the lord, may be taken in execution, that being a common law interest. (3 Prest. Abstr. 351.) Before the stat. 1 & 2 Vict. c. 110, copyhold lands could not be taken in execution upon a judgment; (*Cannon v. Pack*, Vin. Abr. Copyhold, (O. e.) pl. 6; 2 Eq. Cas. Abr. 226. pl. 6;) nor be seized upon an outlawry, because it would have been prejudicial to the lord of the manor. (*Rex v. Budd*, Park. R. 190.) But it seems that they may be sequestered; (*Dunkley v. Scribner*, 2 Madd. 443; *Marquis of Carmarthen v. Hawson*, 3 Swanst. 294;) although the sequestration will not be revived against the heir of the party who was sequestered; (*Whitehead v. Harrison*, 1 Barn. K. B. 431;) and they are within the rules as to marshalling assets. (*Aldrich v. Cooper*, 8 Ves. 388; 2 Pow. on Mortg. 263, n.) But a trust of copyholds, which descended according to the rules of the common law, was assets in the hands of the heir of the *cestui que trust*, as the customary descent is in that case broken. (*Kelly v. Kelly*, 2 Eq. Cas. Abr. 509, pl. 4.)

Copyholds
liable to be
taken in exe-
cution.

By stat. 1 & 2 Vict. c. 110, s. 11, all real estates, including lands and hereditaments of copyhold or customary tenure, of which the person against whom execution is sued, was seised at the time of entering up such judgment, or at any time afterwards, or over which he had alone a power, may be taken in execution; but the person taking such lands in execution is liable to the performance of the services due to the lord of the manor. (See *ante*, p. 282.)

Before this act copyhold estates were not liable, either at law or in equity, to the debts of a testator any further than he charged them. (*Aldrich v. Cooper*, 8 Ves. 393.) But where a testator, having both freehold and copyhold estates, charged all his real estates with the payment of his debts, if he had surrendered the copyhold to the use of his will, the freehold and copyhold would have been applied rateably: but if he had not surrendered the copyhold, it would not have been applied until the freehold was exhausted. (*Growcock v. Smith*, 2 Cox, 397; *Coombes v. Gibson*, 1 Br. C. C. 273; *Kentish v. Kentish*, 2 Br. C. C. 257.) But equity would, before the statute 55 Geo. 3. c. 192, supply a surrender to the use of a will where a manifest intent to charge copyholds with debts appeared in the will. (*Druke v. Robinson*, 1 P. Wms. 443; *Bateman v. Bateman*, 1 Atk. 421.) As to copyholds being charged by a will, see

ool v. Weston, 2 Ves. & Bea. 269; *Godolphin v. Pennack*, Ves. sen. 271; *Doe d. Clarke v. Ludlum*, 7 Bing. 275; *onalds v. Feltham*, Turn. & Russ. 418.

Copyholds were not within the stat. 3 & 4 Will. & Mary, 14, nor the 47 Geo. 3, st. 2, c. 74, nor the 11 Geo. 4 and Will. 4, c. 47, and consequently before the above act were not liable to specialty debts, or debts of traders.

Although an heir at law is bound by specialty debts in respect of freehold lands descended, yet a purchaser of such lands, without notice of any debts, was never held to be subject to them. The statute of fraudulent devises was always considered as placing a devisee on exactly the same footing as an heir at law, although the contrary had been ineffectually attempted to be established. (*Matthews v. Jones*, 2 Anstr. 506.) Equity will however, on behalf of creditors, grant an injunction against a purchaser to restrain payment of the purchase money to the heir. (*Green v. Lowes*, 3 Br. C. C. 217.) And as simple contract creditors under the 47 Geo. 3, st. 2, c. 74, were held to stand in this respect in the same situation as specialty creditors under the statute of fraudulent devises, (*Woodgate v. Woodgate*, Sugd. V. & P. 526, n. 8 ed.; 3 Id. 153, 10 ed.), so it is conceived they will under this act, and that a purchaser of lands from an heir or devisee will not be liable to the payment of the simple contract debts of the intestate or testator.

Purchaser not
liable to
debts.

APPORTIONMENT OF RENTS AND PERIODICAL PAYMENTS.

4 & 5 WILLIAM IV. c. 22.

*An Act to amend an Act of the eleventh year of
King George the Second, respecting the Appor-
tionment of Rents, Annuities, and other Periodical
Payments. (a)*

[16th June, 1834.]

THE STATUTE 11 GEO. 2, c. 19, s. 15, RECITED AND
EXTENDED.

Recital of
stat. 11 G. 2,
c. 19, s. 15, by
which rents
were re-
coverable
from under-
tenants,
where tenants
for life died
before the
rent was
payable.

WHEREAS by an act passed in the eleventh year of the reign of his majesty king George the Second, intituled, "An Act for the more effectual securing the Payment of Rents, and preventing frauds by Tenants," it was enacted, that where any tenant for life should happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments which determined on the death of such tenant for life, the executors or administrators of such tenant for life should and might, in an action on the case, recover of and from such undertenant or undertenants of such lands, tenements, or hereditaments, if such tenant for life die on the day on which the same was made payable the whole, or if before such day then a proportion of such rent according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively: and whereas doubts have been entertained whether the provisions of the said act apply to

every case in which the interests of tenants determine on the death of the person by whom such interests have been created, and on the death of any life or lives for which such person was entitled to the lands demised, although every such case is within the mischief intended to have been remedied and prevented by the said act; and it is therefore desirable that such doubts should be removed by a declaratory law: and whereas, by law, rents, annuities, and other payments due at fixed or stated periods are not apportionable (unless express provision be made for the purpose), from which it often happens that persons (and their representatives) whose income is wholly or principally derived from these sources by the determination thereof before the period of payment arrives, are deprived of means to satisfy just demands; and other evils arise from such rents, annuities, and other payments not being apportionable, which evils require remedy: Be it therefore enacted and declared by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that rents reserved and made payable on any demise or lease of lands, tenements, or hereditaments which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his or her executors or administrators (as the case may be), be considered as within the provisions of the said recited act.

Rents reserved on leases determining on the death of the person making them (though not strictly tenant for life,) or on the death of the tenant *per autre vie*, to be considered as within the provisions of recited act.

(a) The 1st section of 4 & 5 Will. 4, c. 22, does not appear to provide for the case of a lease made by a tenant in fee to a tenant for life reserving rent, and, therefore, where such a lease,

having been granted before the passing of the act, determines by the death of the lessee for life between two rent days, the rent is lost and cannot be apportioned. The act in this section appears to contemplate two cases only; viz. the case of a lease determining on the death of the lessor, and the case of a lease determining on the death of the life for which the lessor was entitled. And even if the lease were granted after the passing of the act, it may be doubted whether such a case falls within the 2nd section. (1 Wms. Executors, 661, n. 3rd ed.)

Prior state of law.

Before the stat. 11 Geo. 2, c. 19, if the lessor tenant for life died within the half year, at the end of which rent was due, the rent reserved upon a lease not made in execution of a power was lost, because the representatives could not recover a part. The principle was, that a contract cannot be apportioned, and that under a lease, with a periodical reservation of rent, the contract for the payment of each portion is distinct and entire. (1 Swanst. 338, n.) In some cases the law qualified this principle; but in no case with respect to time; (Co. Litt. 292 b.; 10 Rep. 128,) and courts of equity did not admit an apportionment of rent in respect of time. (*Jenner v. Morgan*, 1 P. Wms. 392; *Hay v. Palmer*, 2 P. Wms. 502; *Bentham v. Alston*, 2 Vern. 204.) In covenant, as between lessor and lessee, where the action is personal, and upon a mere privity of contract, and on that account transitory, as any other personal contract is, the rent is not apportionable, but it is in an action of covenant by the lessor against the assignee of the lessee, for the condition of such assignee is in point of law different from that of a lessee chargeable on the privity of contract. (*Stevenson v. Lambird*, 2 East, 575.) The stat. 11 Geo. 2, c. 19, s. 15, provided, that where a lessor tenant for life should die before the rent day, his executors might recover from the tenant a proportionate part of rent so growing due, making all just allowances. The Irish statute 23 & 24 Geo. 3, c. 46, provides for a similar apportionment where the *cestui que vie* of an estate *per autre vie* dies before the rent day, a case not provided for by the last quoted English statute, although it was admitted to be a case within its mischief. (3 Taunt. 331. See Wms. Executors, 542, 660, 3rd. ed.) The statute 11 Geo. 2, c. 19, was held to apply where leases had been made by a tenant in tail, which determined on his death, because not conformable to the stat. 32 Hen. 8, c. 28, or on account of there being no issue inheritable under the entail; (*Whitfield v. Pindar*, cited 2 Br. C. C. 662, 8 Ves. 311; *Pagett v. Gee*, Ambl. 198, 1 Swanst. 356,) and rent was apportioned between the representative of a tenant in tail who died without issue, and the remainder-man in tail. (*Vernon v. Vernon*, 2 Br. C. C. 659.) The same statute applied to those cases only where the lease was not binding on the remainder-man or reversioner, and the rent would consequently have been lost both to him and the executor at common law. Therefore, before the above act, if a tenant in fee made

a lease, or tenant for life with a leasing power made a lease in conformity to it, and the lessor died in the interval between two periods of the rent being due, i. e. at any time before midnight of the rent day, the whole rent went to the heir or remainder-man, and there could be no apportionment in favour of the executor. (Wms. Law of Executors, 540; *Norris v. Harrison*, 2 Madd. 268, 10 Rep. 127 b.; *Duppa v. Mayo*, 1 Saund. 287; 1 P. Wms. 177; 2 Bl. R. 1075; 4 T. R. 173.) Rent was apportioned where a man seised of two acres, one in fee and another in tail, made a lease for life or years, and died, and the issue in tail avoided the lease. (Co. Litt. 148 b.) So where a lease of lands of which the lessor was seised in fee, and of other lands of which he was tenant for life, with a power of leasing, was granted at a certain rent, but the lease was not well executed according to the power, it was held that the lease as to the lands held in fee was good, because the rent might be apportioned. (*Doe v. Meyler*, 2 Maule & S. 275.) Where a tenant for life with a leasing power granted leases from year to year, some by parol, some in writing, but not conformable to the power, on his death before the expiration of the lease, the rents were apportioned. (*Clarkson v. Scarborough*, 1 Swanst. 354; *Symons v. Symons*, 6 Madd. 207; *Ex parte Smyth*, 1 Swanst. 337.) It has not been expressly settled whether any apportionment will take place in the case of a prior-existing tenancy from year to year, which the tenant for life claiming under the original lessor permitted to continue until the death of the former. (4 Byth. & Jarm. Prec. 357; Woodfall's L. & T. by Harrison, 288, 2d. ed.) A tenant in fee demised lands from year to year. He died, having devised the lands for life. The devisee for life received rent, but did not live long enough to have a right to determine the yearly tenancy. It was held that the administrator of the tenant for life was not entitled to an apportionment of the rent under the stat. 11 Geo. 2, c. 19, s. 15. (*Botheroyd v. Woolley*, 5 Tyrw. 522; 1 Gale, 66.) Where a lessee under a lease which determined at the death of the lessor, but was not within the stat. 11 Geo. 2, c. 19, paid over the whole rent for the current quarter, or other integral period, to the person entitled in remainder, such person would have been compelled to account for a proportion of it to the lessor's representatives, though the latter had no remedy against the tenant for its recovery, on the principle that where a man pays money from equity and conscience, though not bound at law, such money shall be divided according to equity. (*Paget v. Gee*, Ambl. 198; *Hawkins v. Kellu*, 8 Ves. 308.) And on the same principle, a composition for tithes received after the death of the incumbent by his successor, was apportioned with reference to the respective periods of enjoyment. (*Aynsley v. Wordsworth*, 2 Ves. & B. 331.) Although it had been held that if the successor continued to receive the next payment after the death of his predecessor, the former would only be accountable to

When there was an apportionment and when not.

the executors of the latter for such a portion as the value of the tithes, if paid in kind, accruing due between the last composition received by the late incumbent and his death, would have amounted to. (*Williams v. Powell*, 10 East, 269.) When a rector agreed with an occupier of land for a certain sum of money in lieu of tithes, payable yearly at Michaelmas, and the rector died about a month before Michaelmas, it was decreed, that the agreement having been determined by the death of the rector, the successor should be entitled to tithes in kind from such death, and the executor of the last incumbent to a proportion, according to the agreement, until the death of the testator. (Bunb. 294.) Though rents and common annuities were not apportionable, yet in equity the maintenance of infants was always apportioned up to the day of their death, because it would be difficult for them to find credit for necessities, if the payment depended on their living to the end of the quarter. (*Hay v. Palmer*, 2 P. Wms. 501.) And upon the same principle, an annuity secured by bond for the separate maintenance of a feme covert, where the quarterly payments were not made in advance by way of maintenance for the ensuing quarter, but payable at the end of each quarter, was apportioned at the death of the wife. (*Howell v. Hanforth*, Bl. R. 1016.) But an annuity given by will to a married lady, living with and maintained by her husband, for her separate use, payable half-yearly, was not apportioned. (*Anderson v. Dwyer*, 1 Sch. & Lef. 301.) The interest of money secured on mortgage, although reserved half-yearly, is considered as accruing from day to day, and not in the nature of rent; and on the death of a person entitled to the interest for life, what is due from the last day of payment will be apportioned between his executors and the remainder-man. (*Edwards v. Countess of Warwick*, 2 P. Wms. 171.) But interest given by a will, in the nature of an annuity, was not apportioned in favour of the executor of the tenant for life. (*Franks v. Noble*, 12 Ves. 484.) Before the passing of this act, if a testator was entitled to the dividends of stock in the public funds for his life, and he died between the two days when they are due, his executors cannot claim any apportionment, but the whole half year's dividend will go to the remainder-man. (*Rashleigh v. Master*, 3 Br. C. C. 99; *Pearly v. Smith*, 3 Atk. 260; *Sherrard v. Sherrard*, 3 Atk. 502; *Wilson v. Harman*, 2 Ves. 672, Amb. 279.) In the case of money directed to be laid out in the purchase of land to be settled on a person for life, with remainder over, and in the meantime to be invested in government securities, the personal representatives of the tenant for life, who died before the half-yearly day on which the dividends became due, were not entitled to any apportionment, but the whole went to the person in remainder. (*Sherrard v. Sherrard*, 3 Atk. 502; *Pearly v. Smith*, Id. 280, S. C. Amb. 279.) Thus, where by articles money was to be laid out in the purchase of lands, and in the meantime to be invested in South Sea Annuities, and the pro-

as to go in the same way as the rent of the land would, and he person who would have been tenant for life of the land lie in the middle of the quarter: it was held that the dividends on those annuities being made payable by act of parliament on certain days, like rent, were not to be apportioned, being distinguishable from the case of money secured by mortgage, which may be called in at any time. (*Wilson v. Harman*, 1 Ves. sen. 672.) Where an annuity secured upon bond payable quarterly, and by will charged on real estate in aid of the personal estate, had been ordered to be paid out of a fund in Court half-yearly, at Midsummer and Christmas; the annuitant having died between Lady-day and Midsummer, her representative obtained an order for payment of the quarter to Lady-day. (*Webb v. Lord Shaftesbury*, 11 Ves. 361.) Upon the accounts of the receiver a point was made, whether a tenant for life, having died in the middle of the year, the land-tax, quit-rents, and other charges, should be borne entirely by the estate of the son, the infant remainder-man in tail, having actually become due after the death of the tenant for life, or whether there should be an apportionment; it was held, that however reasonable it might be to make a statute as to the apportionment of taxes between the tenant for life and the remainder-man, the stat. 11 Geo. 2, c. 19, s. 15, had no reference to the case giving the tenant for life the benefit only as against the tenant, the under lessee. (*Sutton v. Chaplin*, 10 Ves. 66.)

There are two modes of apportioning rent, one by granting the reversion of part of the land out of which the rent issues; the other by granting part of the rent to one person and part to another. (*Bliss v. Collins*, 1 D. & R. 291; 5 B. & Ald. 882.) If the lessor dispose of part of the lands in reversion, either by will or deed, and the lessee attorn to such grantee, the rent is apportionable, but the lessee's concurrence to the apportionment is necessary. (*West v. Lascelles*, Cro. Eliz. 851; 13 Rep. 57 a.) A rent charge may be divided by will, or by deed operating under the statute of uses, so as to render the tenant liable without an attornment to several distresses by the devisees or cestuis que use. And it seems that since the statute 4 Ann. c. 16, s. 9, a rent-charge may be so divided by a conveyance of any kind. (*Rivis v. Watson*, 5 Mees. & W. 255; see *Colborne v. Wright*, 2 Lev. 289.) Rent service may be devised by will, and divided from the reversion so as to enable a devisee of part of the rent to maintain an action of debt. (*Ard v. Watkin*, Cro. Eliz. 637, 651.)

Apportionment of rent, &c. amongst owners of the reversion.

In replevin against the assignee of the reversion of part of the premises demised, the defendant may avow at common law, stating the facts specially, and leaving the apportionment of the rent to be made by the jury; or he may avow in the general form given by 11 Geo. 2, c. 19, s. 22, as upon a holding at a certain rent; and if he avow under the statute for the entire rent, or with a deduction from the entire rent greater or less

than the proportion properly belonging to his interest in the reversion, the judge at *Nisi Prius* may direct the avowry to be amended, either by converting it into an avowry at common law, or leaving it as an avowry under the statute by describing the rent in conformity with the proportionate value of the respective particles or parts into which the reversion has been divided. It seems that the judge or the court substituted by consent of parties for the judge at *Nisi Prius*, may make such amendment, although first prayed for after the verdict is delivered, and before it is recorded. (*Roberts v. Snell*, 1 Mann. & G. 577.) That assignee of part of the reversion may distrain as well as an assignee of the reversion in part of the premises, *Neale v. Mackenzie*, 1 M. & W. 747, 757; *Stevenson v. Lambard*, 2 East, 575; 2 Inst. 503; *Jacob v. Kirk*, 2 M. & Rob. 221.

If part of the land out of which the rent-charge issues is evicted by a title paramount, the rent will be apportioned; and if a rent service is chargeable on land which descends to parceners, and they make partition, and one is distrained for the whole, she may compel the others to contribution. The same doctrine will apply to co-tenants of the land, or of different parts of the land. (Co. Litt. 146, 148, 149; Com. Dig. Suspension. E. G.; 2 Inst. 119; Bac. Abr. Rent, M. 1, 2; *Averall v. Wade*, Lloyd & G. temp. Sugd. 252.)

If the lessee be evicted from part of the land by title paramount to the landlord, the rent may be apportionably diminished according to the proportion of the land evicted. But if the lease be bad as to part of the land by the act of the lessor, he will not be entitled to an apportioned rent in respect of so much of the land as is well demised.

A lessee of one hundred acres of land accepted the lease and entered upon the land: upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until half a year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. It appeared from the dates of and averments in the pleadings, that the prior lease was for a term extending beyond the duration of the latter lease. It was held, on error, (reversing the judgment of the Court of Exchequer,) that the latter demise was wholly void as to the eight acres; and that the rent was not apportionable; and the lessor was not entitled to distrain for the whole rent or any part of it. (*Neale v. Mackenzie*, 1 M. & W. 747; 2 Cr. M. & R. 84; see *Tomlinson v. Day*, 5 Moore, 558; 2 Brod. & B. 681.) Where two messuages were conveyed to such uses as A. should appoint; and in default of appointment to A. for life, and after the determination of that estate in his lifetime to B. for the life of A., in trust for A. and his assigns, with remainder to A. in fee; A. leased both these messuages to a tenant at an entire rent of 65*l.* 10*s.* for a term of years; and during the

continuance of that term contracted to sell the reversion of one of the messuages to C. In the contract the messuage was described to be on lease, together with another, and that the apportioned rent in respect of it was 40*l.* A. and B. afterwards conveyed the reversion of both houses and the entire rent of 65*l.* 10*s.* unto D. to certain uses, viz. as to the messuage which A. had contracted to sell, and the yearly rent of 40*l.* together with all powers and remedies reserved for recovering the rent of 65*l.* 10*s.* to such uses as A. should appoint; and as to the other messuage and the residus of the entire rent to the use of A. in fee; A. afterwards appointed the messuage which he had contracted to sell, and the apportioned rent to the vendee. On a case sent by the Court of Chancery for the opinion of the judges of the Court of King's Bench, it was certified that the purchaser of the estate in question had not, by the aforesaid conveyances, acquired the same rights and remedies against the lessee as he would have acquired if the rent had been legally apportioned by a jury; inasmuch as the lessee was not bound by the apportionment made without his consent, but might dispute the propriety thereof, and cause the rent to be apportioned anew by a jury. (*Bliss v. Collins*, 5 B. & Ald. 876; S. C. 1 Dowl. & Ry. 291; 4 Madd. 229; 1 Jac. & W. 426.) It may be observed that the above mode would have been free from objection if the lessee had been a party to the deed of apportionment, and consented to it, or had attorned tenant at the apportioned rents. Where a leasehold was sold, subject to a ground rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by any existing deed, but only by the receipt by a mesne landlord of the separate rent for twenty years and upwards, it was held that the purchaser was not bound to accept the title. (*Barnwell v. Harris*, 1 Taunt. 430.) And it was said by *Mansfield*, C. J., that a court of equity would not decree a specific performance unless the vendor could procure the ground landlord to apportion the rent by joining in an assignment of the lease, in which assignment the apportioned rent should appear. (*Ibid.*) Where it appeared that a house agreed to be sold was one of six houses built on ground demised by the Skinners' Company to Mr. Burton, for a term of ninety-nine years, from Michaelmas, 1807, at a ground rent of 10*l.*; and such lease contained a proviso for re-entry upon non-performance of any of the covenants contained in it, it was held that the vendor, who was in possession of the house in question by an assignment of an underlease granted by Mr. Burton, containing all the covenants in the original lease, could not compel the specific performance of the sale of such house, though he offered to indemnify the purchaser against the performance of the covenants. (*Fildes v. Hooker*, 3 Madd. 193; S. C. 2 Mer. 424; *Warren v. Richardson*, 1 Younge, 1.) On the sale of an estate in lots, stating that certain parts were in lease, and that the purchaser of particular lots would be entitled to an appor-

tioned part of the rent of such parts, it was held that the landlord might make a good title without the consent of the tenant; for there it was not necessary to consider what remedies a purchaser would have, but whether he could have a good title. (*Walter v. Maunde*, 1 Jac. & Walk. 181.) Where an estate was sold in lots, and one of the conditions of sale stated that the estate was subject to the perpetual payment of 120*l.* to the curate of A.; but the same, and a perpetual annual payment of 20*l.* to the hospital of B., were in future to be charged upon and paid by the purchaser of lot 1 only; it was held that the purchasers of the other lots were only entitled to such an indemnity as could be made to them by the purchaser of lot 1. (*Cesamajor v. Strode*, 2 Swanst. 347; S. C. 1 Wils. C. C. 428; Jac. 630.)

**Release of
rent charges.**

If a man, having a rent-charge issuing out of lands, purchases any part of them, the rent-charge is extinct in the whole, (Litt. s. 222,) because the rent is entire and against common right, and issuing out of every part of the land; (Co. Litt. 147 b; 1 Roll. Abr. 234; see Gilb. on Rents, 152;) although it is otherwise where part of the lands out of which the rent issues descends on the grantee. (1 Roll. Abr. 236, pl. 6.) If the grantee of a rent-charge purchases part of the land, and the grantor, by his deed reciting such purchase, grants that he may distrain for such rent-charge in the residue of the land, this amounts to a new grant. (Co. Litt. 147 b.) A person having a rent-charge, by releasing all his right in part of the land charged, extinguishes the whole rent, because it issues out of every part, and cannot be apportioned. (18 Vin. Abr. 604.) But a person having a rent-charge may release part of it to the tenant of the land, and reserve part, for the grantee deals only with that which is his own, namely, the rent, and not with the land. (Co. Litt. 148 a; 3 Vin. Abr. 10, 11.) So if the lessee surrender part of the land to the lessor, the rent service will be apportioned. (Co. Litt. 148.) On the sale of part of estates subject to a rent-charge, it frequently happens that the party entitled to it is willing to release the land sold, but in consequence of the principle already stated, that a release of part of the lands is a release of the whole, difficulties have arisen in settling the mode of effecting such exoneration. One mode sometimes adopted has been for the owner of the rent charge to assign it to a trustee upon trust to receive it exclusively out of the lands intended to remain charged. Another mode has been for the annuitant to join in the conveyance of the lands sold, and to add a proviso that the other lands shall continue liable. The material objection to this plan is, that as the proviso would operate as a new grant, the rent-charge would be liable to such incumbrances of the owner of the land as were created before the conveyance. Sometimes a covenant has been obtained from the owner of the rent-charge not to distrain on the lands sold; but this plan is objectionable, inasmuch as it is doubtful whe-

her such a covenant would not operate as a release of the whole rent charge. (*Butler v. Munnings*, Noy, 6; *Deus v. Isferries*, Cro. Eliz. 352. See Shepp. T. by Prest. 345.) A covenant not to sue has been held equivalent to a release, on the principle of avoiding circuity of action where the parties are the same. (*Walmesley v. Cooper*, 11 Ad. & Ell. 216, and cases there cited.) Where the owner of the rent-charge will not concur, and part only of the lands charged with it is sold, the vendor may covenant with the purchaser that the lands not sold shall be exclusively charged with the rent-charge, and grant a power of distress and entry upon them for raising it, and all expenses to be incurred by the purchaser, or demise other lands for the same purpose. There does not appear to be any substantial reason why such a purely technical rule of law should not be altered, so as to enable the owner of a rent-charge to release part of the lands from it, without affecting his remedies against the remainder of the land. The rule of law, that conditions are entire and cannot be apportioned by the act of the parties, (Co. Litt. 215 a; *Dumpor's case*, 4 Rep. 119 b; see *Wetherall v. Geering*, 12 Ves. 511,) has been found equally inconvenient in practice, where the object of the parties has been to grant a partial dispensation with a condition, or to give the benefit of it to several grantees of the reversion, (*Knight's case*, 5 Rep. 55 b; see *Brummell v. Macpherson*, 14 Ves. 173; 4 Taunt. 736; 1 V. & B. 191; 3 Real Prop. Rep. p. 49;) for the severance of any part of the reversion destroys the whole condition, giving one entire right of entry into the premises on non-payment of rent or the like; (*Knight's case*, 5 Rep. 55 b; *Dumpor's case*, 4 Rep. 120 b; Co. Litt. 215 a;) and if a lessor assigns the reversion of part of the premises to one, his right of entry would be gone, (*Twynam v. Pickard*, 2 B. & Ald. 112;) although it has been decided that an action of covenant will lie by the assignee of the reversion of part of the demised premises against the lessee for not repairing. (8. C. 1d. 105; see Shepp. T. 176.)

PERIODICAL PAYMENTS WHICH ARE TO BE APPORTIONED, AND THE RECOVERY OF APPORTIONED PARTS.

II. And be it further enacted, That from and after the passing of this act, all rents service reserved on any lease by a tenant in fee or for any life* interest, or by any lease granted under any power, (and which leases shall have been granted after the passing of this act,) and all rents charge

All rents, annuities, and other payments coming due at fixed periods to be apportioned;

* Sic, sed quare less.

but see *Thorne v. Gough*
13. L. J. Ch. p. 232

and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act, (or being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions, and other payments being made; and that every such person, his or her executors, administrators, and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions, and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, (b) as he, she, or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions, and other payments, if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised

subject to all
just deduc-
tions.

Remedies for
obtaining the
apportioned
parts.

therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who if this act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act in any action or suit at law or in equity.

(b) A lunatic's estates, of which he was seised in fee, were let by parol agreement from year to year, the rents payable half-yearly at Lady-day and Michaelmas. The lunatic died in June: it was held, that the proportion of the half year's rents from the last Lady-day before the lunatic's death up to the day of his death, was not apportionable under the stat. 4 & 5 Will. 4, c. 22. Lord Cottenham, C., was of opinion that the statute does not apply to this case. First, it enumerates the most worthy subject, namely rents service, that is rents reserved under leases: then it proceeds to give an enumeration of various other subjects, concluding with a general clause, large enough to embrace every kind of payment coming due at fixed periods; and it requires that they should be under an instrument executed after the passing of the act. But there was no intention on the part of the legislature to make any distinction between the several matters which are the subject of the enactment, as to whether the payments should or should not be under an instrument in writing. Even in the case of the least worthy of the subject-matters which the section enumerates, it was intended that the instrument creating or evidencing the payment should be in writing; and *à fortiori*, that was so as to the most worthy; the only question being as to the time at which the instrument was to be executed. (*In re Markby*, 4 M. & Cr. 484; 3 Jur. 767.)

Act does not apply to rents not reserved by writing.

The stat. 4 & 5 Will. 4, c. 22, s. 2, only applies where the rent still remains, but is to be apportioned between two parties; for it says, that the person who has the portion of the rent, is to recover the same "when the entire portion, of which such apportioned parts shall form part, shall become due, and not before;" and from whom is he to recover it? from the person who has received the entire rents, so that "the person liable to pay the rents shall be resorted to for such apportioned parts." The act cannot apply to a person who has chosen to come in and determine his right to receive rents. (*Oldershaw v. Holt*, 4 P. & Dav. 313, per Coleridge, 12 Ad. & Ell. 590.)

A. in 1836, let certain land to B. under a building agreement; the rent was to commence at Christmas, 1838, and A. to have a right of re-entry in case of non-performance on the

part of B. A. availed himself of this right of re-entry, and brought an ejectment, laying the demise on the 1st January, 1839. In September, 1838, he had re-let the land to C. at a rent to commence in 1840, which was equivalent in amount to that provided for by the first agreement. In an action by A. for breaking the first agreement, it was held, first, that the demise in the ejectment was to be taken as the date of the re-entry by A., and that he was not entitled to that portion of the rent between the previous Christmas and that day, under the provisions of the stat. 4 & 5 Will. 4, c. 22. Second, that it was properly left to the jury, as a mere money calculation, to say whether A. had sustained more than nominal damages by the breaking the agreement. (*Oldershaw v. Holt*, 4 Per. & D. 307; 12 Ad. & Ell. 590.)

It has been doubted whether an annuity payable on certain days, as half-yearly or quarterly, determinable on the death of the grantor, would come within this act, which enables the annuitant to recover the apportioned parts "*when the entire portions of which such apportioned parts form part shall become due and payable*," because if the annuity ceased by the death of the grantor on any other day than that appointed for payment, the *entire* portion would never become payable. It has therefore very properly been recommended that the usual apportionment clause in the grant of such an annuity should be retained. (9 Jarman's Prec. 578, n.)

EXCEPTION.

Act not to
apply to cer-
tain cases.

III. Provided always, and be it enacted, that the provisions herein contained shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description. (c)

(c) The provisions of this act are extended to all rent-charges payable under the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, s. 86.

LOANS ON REAL SECURITIES IN IRELAND.

4 & 5 WILLIAM IV. c. 29.

*An Act for facilitating the Loan of Money upon
Landed Securities in Ireland. (a)*

[25th July, 1834.]

MONEY DIRECTED TO BE LENT ON ENGLISH SECURITIES MAY BE ADVANCED ON REAL SECURITIES IN IRELAND.

WHEREAS in last wills and other testamentary dispositions, and in marriage and other settlements of real and personal property, and in other deeds, agreements, or writings, a direction, trust, or power is often given, created, or reserved to lay out or invest money at interest on real securities, in England, Wales, or Great Britain, or to sell and convert into money real or leasehold estates, or government or parliamentary securities, or securities of foreign states, or other property, and to lay out or invest the money arising from such sale and conversion on real securities: And whereas from the abundance of capital in Great Britain the interest of money is very much reduced, and the interest to be procured on money in Ireland is much higher than the interest to be procured on money in Great Britain: And whereas manifest improvement has taken place in the condition and security of landed property in Ireland, which it is desirable to encourage and advance: And whereas it would be highly beneficial to both Great Britain and Ireland if the loan of money on landed securities in Ireland was facilitated: be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spi-

Power to lend money on real securities in Ireland the same as in England, &c.

ritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act it shall be lawful for any person or persons who, under or by virtue of any direction, trust, or power already given, created, or reserved, or hereafter to be given, created, or reserved as aforesaid, is or are or shall be authorized or directed to lend money at interest on real securities, (b) in England, Wales, or Great Britain, to lend the same or any part thereof at interest on real securities in Ireland in the same manner in all respects as if such investment had been expressly authorized in or by such direction, trust, or power as aforesaid; and such person or persons shall not, on account of his or their so lending money on real securities in Ireland, be considered in a court of equity guilty of any breach of trust, or held accountable further or otherwise than if the money had been laid out by him or them on real securities in England, Wales, or Great Britain.

Object of this act.

(a) This act enables trustees and others to lend money on real securities in Ireland without committing a breach of trust, although the trust or power authorizing the investment only directs the money to be laid out on real securities in England, Wales, or Great Britain. By statute 14 Geo. 3, c. 79, s. 2,

Rate of interest in Ireland.

it is enacted, that none of his majesty's subjects in Great Britain shall be subject or liable to any of the penalties or forfeitures inflicted by the stat. 12 Anne, stat. 2, c. 16, by receiving or taking interest for any sum or sums of money really and *bond fide* lent on mortgages, security, bond, covenant, transfer, or assignment of lands in Ireland, or in the colonies or plantations in the West Indies, the securities for which are made and executed in Great Britain, so as the interest so to be received or taken do not exceed the rate of six pounds for one hundred pounds for a year. This statute relates solely to securities on land in Ireland and the colonies. A. contracted with B. for the sale of an estate in the West Indies, and it was agreed that part of the purchase money should remain secured by the bond of B. and C., and that bond was afterwards cancelled and another executed in England by B. and D., reserving 6l. per cent. interest (in the same manner as in the former bond), which was held to be usurious. (*Dewar v. Span*, 3 T. R. 425.) A revolted colony of Spain, not recognized as an independent state by Great Britain, executed bonds at six per cent. interest, as a security for a loan;

it was held that the bonds were not usurious, as it did not appear by the bill that the contract for the loan was made, or the amount of it to be paid in this country. (*Thompson v. Powles*, 2 Sim. 194; see *Harvey v. Archbold*, 5 D. & R. 500; 3 B. & C. 626; R. & M. 184; *Ex parte Guillaibert, re Tye*, 3 Mont. & A. 455.)

The general rule is, that interest is to be paid on contracts according to the law of the place where they are to be performed, in all cases where interest is expressly or impliedly to be paid. (See Story's Conflict of Laws, 396, &c., 2d edit.) It was doubted whether a bond or covenant entered into by a third person for further securing the mortgage money was within the exception in the last-mentioned act; but by the 1 & 2 Geo. 4, c. 51, all bonds and covenants which had been, or which after the passing of that act should be made and executed in Great Britain either by the person borrowing, or by any other person or persons, either residing in Great Britain or elsewhere, by way of collateral security to any mortgage, security or transfer of mortgage of lands, tenements, slaves, cattle, or other things, lying in Ireland, or any of his majesty's colonies, are rendered as valid and effectual to all intents and purposes as if made and executed where the lands lie; and it is declared, that none of his majesty's subjects in Great Britain shall be liable to the penalties of the said act of Queen Anne, by receiving or taking interest for monies *bond fide* advanced on any such security, bond, covenant, or transfer, so as the interest to be received thereon do not exceed 6l. per cent. per annum.

It is perhaps hardly necessary to observe, that securities on lands in Ireland must be registered as required by the stat. 6 Anne, (Ir.) c. 2, and 2 & 3 Will. 4, c. 87. (See 2 Powell on Mortgages, by Cov. p. 629, n.) Registration.

(b) Real securities mean landed securities, that is, mortgages or other incumbrances affecting land. (*Attorney-General v. Bowles*, 3 Atk. 808; see 2 Ves. sen. 44; *Ambli*. 635.)

DIRECTION OF COURT OF EQUITY REQUIRED IN CASE OF MINORS, &c.

II. Provided always, and be it further enacted, that all loans of money on real securities in Ireland under this act, in which any minor or unborn child or person of unsound mind is or may be interested, shall be made by the direction and under the authority of the Court of Chancery or Exchequer in England, such direction or autho-

Proviso for loans where minors, &c. are interested.

rity being obtained in any cause upon petition in a summary way.

PAYMENT OF MONEY LENT BY TRUSTEES OR PUBLIC BODIES ON SECURITIES IN IRELAND MAY BE DECREED IN ENGLISH COURTS OF EQUITY.

Loans by
trustees, or
public bodies.

III. And be it further enacted, that in all cases of trustees or public bodies lending money on real securities in Ireland under the authority of this act, it shall be lawful for any court of equity in England to make all such orders and decrees for enforcing payment of the principal and interest thereby secured, or any part thereof, as if the said lands and hereditaments were situate in England or Wales; and it shall be lawful for the party or parties obtaining such orders or decrees to cause a copy of such orders or decrees, under the seal of the court by which the same shall have been made, to be exemplified, and certified to the lord chancellor, lord keeper or lords commissioners of the great seal of Ireland for the time being, or to the barons of his majesty's Court of Exchequer in Ireland, whereon the said lord chancellor, lord keeper or lords commissioners for the custody of the said great seal of Ireland, or the said barons of the said Court of Exchequer in Ireland, shall forthwith cause such copy of such order or decree, when it shall be presented to them respectively so exemplified, to be inrolled, either in the rolls of the Court of Chancery or in the said Court of Exchequer, as the case may be, and shall cause all such process to issue against the said lands and hereditaments comprised in the said securities, and the party or parties against whom such decrees or orders shall be obtained, and his, her, or their real and personal estate, goods, chattels, and effects, in Ireland, in order to enforce obedience to and performance of the same, in such manner and form, and with such force and effect, as if the cause wherein such order or decree shall have been made had been originally cognizable by and instituted in

the said Courts of Chancery or Exchequer in Ireland; and it shall be lawful for the said lord chancellor, lord keeper or lords commissioners of the great seal in Ireland, or the said barons of the said Court of Exchequer in Ireland, to make such order or orders in respect of or consequent upon such process against the party or parties, or in respect of the said lands, or the real and personal estate, goods, chattels, or effects of the said party or parties, as he or they shall from time to time think fit, or for payment of all or any of the monies levied or received by virtue thereof into the Bank of Ireland, with the privity of the accountant-general of the said Courts of Chancery and Exchequer in Ireland respectively, to the credit or for the benefit of the party or parties who shall have obtained such order or decree, or to the credit of the cause in which such order or decree shall have been made; and the governor and company of the Bank of Ireland are hereby authorized and required to receive and hold all such monies, subject to the orders of the said Court of Chancery in Ireland: Provided always, that no such monies shall be charged with or subject to poundage for the usher of the said Court of Chancery in Ireland, or otherwise, where the same shall be paid out by order of the said last-mentioned court: And provided always, that no security for costs shall be required to be given in Ireland by any party or parties enforcing in manner aforesaid the execution of such orders or decrees of any court of equity in England as hereinbefore mentioned. (c)

(c) It was decided that the concluding part of the 3d section must be read thus: "in any cause, or upon petition in a summary way," and that the proposed securities must be approved of by the Master. (*Ex parte French*, 7 Sim. 510.)

When a person residing out of the jurisdiction of the Court of Chancery in Ireland files a bill there, and the defendant appears, but does not make any application to the court for time to answer, it is an order of course to direct the plaintiff to give security for costs, but the application for time is a waiver of the right to require security. (*Stackpole v. O'Callaghan*, 1 Ball & B. 566, and note.)

CONSENT TO BE OBTAINED.

Consent of
persons inter-
ested to be
had.

IV. Provided always, and be it enacted, that every such loan shall be made with the consent of the person or persons, if any, whose consent may be required as to the investment of such money upon real securities in England, Wales, or Great Britain, testified in the manner required by such direction, trust, or power. (d)

(d) The nature of the consent will depend upon the terms of the trust or power, which must be strictly pursued. Where power was given to trustees with the consent of A. under her hand, attested by two witnesses, to advance 1500*l.* to her husband, which they lent without the consent of A., who by a subsequent instrument under her hand, attested by two witnesses, testified that the money was advanced with her consent; it was held, on a bill filed by A., that the trustees must refund the 1500*l.* with costs, for the actual advance of the money to the husband created a pressure upon the judgment of A., which gave to her subsequent approbation a different character from the free consent required by the settlement. (*Bateman and others v. Davis and others*, 3 Madd. 98.)

Where by a marriage settlement the interest of a trust fund was limited to a wife for life to her separate use, with power to the trustees upon her consent in writing to advance the trust fund to her husband, upon the security of his bond; if the trustees, with the consent of the wife, advance the fund to the husband, but without her written consent, and without the husband's bond, and if the trust fund be lost by his subsequent bankruptcy, the trustees are not entitled to be indemnified to the extent of the wife's interest. (*Cocker v. Quayle*, 1 Russ. & M. 585. See *Chelmsley v. Paxton*, 5 Bingh. 48.)

◆

EXCEPTION.

To what cases
act not to ex-
tend.

V. Provided also, and be it enacted, that the provisions of this act shall not apply to any case in which such direction, trust, or power as aforesaid doth or shall or may contain any express restriction against the investment of such money as aforesaid on securities in Ireland. (e)

(e) As the investment of money in settlement on securities in Ireland may put parties to much trouble and inconvenience, in the absence of a contrary intention it will be proper in the

mal trust or power directing money to be invested "in the parliamentary stocks or public funds of Great Britain, or upon government or real securities in England or Wales," to add, *but not on real or other securities in Ireland,*" or words to that effect.

A. B. being entitled under the will of her husband to the interest of a sum of money during her widowhood, with remainder to other parties, which sum the trustees named in the will were to be at liberty to invest in real securities in England and Wales, presented her petition under the stat. 4 & 5 Will. 4, c. 29, to have the money invested in real securities in Ireland; it was held, that although an investment in Ireland might be for the advantage of the petitioner, on account of getting more interest for it, yet that unless it appeared that it would be for the benefit of those in remainder, the court would not make an order sanctioning such an investment. (*Stuart v. Stuart*, 5 Jurist, 3.)

When court refused to make order.

TRUSTEES TO BE RESPONSIBLE FOR TITLE.

VI. Provided always, and be it further enacted, that nothing contained in this act shall relieve or be construed to relieve any person or persons intrusted or clothed with such direction, trust, or power as aforesaid from any responsibility as to title, security, or otherwise, either at law or in equity, save that having lent and advanced such money as aforesaid on real securities in Ireland instead of having invested such money on real securities in England, Wales, or Great Britain.

Act not to relieve persons intrusted with trust or power from responsibility as to title, &c.

ENACTMENTS RELATIVE TO JUDG-
MENTS AFFECTING REAL AND
PERSONAL PROPERTY,

CONTAINED IN THE 1 & 2 VICT. c. 110; 2 & 3
VICT. cc. 11, 29; AND 3 & 4 VICT. c. 82.

1 & 2 VICT. c. 110.

*An Act for abolishing Arrest on Mesne Process in
Civil Actions, except in certain Cases; for ex-
tending the Remedies of Creditors against the Pro-
perty of Debtors; and for amending the Laws for
the Relief of Insolvent Debtors in England.**

[16th August, 1838.]

OF THE EXECUTION OF WARRANTS OF ATTORNEY.

Warrants of
attorney and
*cognovit ac-
tionem* to be
executed in
the presence
of an attorney
on behalf of
the party.
Construction
of act.

IX. And whereas it is expedient that provision
should be made for giving every person executing
a warrant of attorney to confess judgment or a
cognovit actionem due information of the nature

* The 121st section declares that this act shall extend to
aliens, denizens, and women, both to make them subject
thereto and to entitle them to all the benefits given thereby;
and all powers given to or duties directed to be performed by
the lord chancellor may be performed by the lord keeper or
lords commissioners of the great seal; and all powers given to
or duties directed to be performed by the Court of Review
may be performed by any one of the judges of the same court;
and that whenever this statute hath used words importing the
singular number or the masculine gender only, it shall be
understood to include several matters as well as one matter,
and several persons as well as one person, and females as
well as males, and bodies corporate as well as individuals,
unless it be otherwise specially provided or there be some-
thing in the subject or context repugnant to such construc-
tion; and that this act shall not extend either to Scotland or
Ireland, except where expressly mentioned.

nd effect thereof; be it enacted, that from and after the time appointed for the commencement of his act (1 October, 1838, England; 1 November, 1840, Ireland) no warrant of attorney to confess judgment in any personal action, or *cognovit actionem* given by any person, shall be of any force unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney. (3 & 4 Vict. c. 105, s. 10, Ireland. (a))

(a) The corresponding sections in 3 & 4 Vict. c. 105, as to judgments in Ireland, with the variations, are noticed at the end of each section.

In order to make a *cognovit* valid its execution must be attested by an attorney attending on behalf of the defendant, other than the attorney acting for the plaintiff. (Mason v. Kiddle, 5 Mees. & W. 513; 4 Jur. 89; Rising v. Dolphin, 4 Jur. 193; 8 Dowl. P. C. 309.) The country agent of an attorney is not a competent witness to the execution of a *cognovit*, though expressly named by the defendant. (Mason v. Riddle, 8 Dowl. P. C. 207.) A warrant of attorney is not vitiated by the fact that the name of the attorney who attests on behalf of the defendant was first suggested by the plaintiff's attorney, if he was expressly adopted by the defendant as his attorney for that purpose. (Taylor v. Nicholls, 6 Mees. & W. 91; 8 Dowl. P. C. 242; 4 Jur. 271. See Kemp v. Matthew, 8 Scott, 399; Hale v. Dale, 8 Dowl. P. C. 599; 4 Jur. 988; Pease v. Wells, 8 Dowl. P. C. 626; 4 Jur. 679.) But where the attorney acting for the defendant is named by the plaintiff, the defendant must have a full opportunity of exercising his discretion as to the adoption, otherwise the *cognovit* will be bad. (Barnes v. Pendrey, 8 Dowl. P. C. 747.) It is not necessary that the party executing a *cognovit* should first name the attorney to attest the execution thereof, nor is it necessary that such attorney should be the regular attorney of the party giving the *cognovit*; it is sufficient if he be merely employed for the occasion, provided the person giving the *cognovit* shall ultimately exercise a free discretion in the adoption of him. (Pease v. Wells, 8 Dowl. P. C. 626; 4 Jur. 679.)

By whom
warrant of
attorney to
be attested.

An attorney in those cases cannot act for both parties; Attorney

cannot act for both parties. (*Morley v. Davis*, 5 Jur. 246;) as where the attorney being in the first instance the attorney of the defendant generally, and being so particularly in respect of a warrant of attorney which he subscribes for him, and also superadds, in reference to this instrument, the character of attorney for the plaintiff, such attestation is invalid. (*Rising v. Dolphin*, 8 Dowl. P. C. 309; 4 Jur. 193.) But one attorney may act for each of three defendants, who freely recognize the attorney as acting for each of them respectively. (*Haigh v. Frost*, 7 Dowl. P. C. 743.) When on the execution of a warrant of attorney there was but one attorney present, who had previously acted for the plaintiff, and who on that occasion made out his bill to the plaintiff, but delivered it to the defendant and was paid by him; it was held that he was not such an attorney acting on behalf of the defendant as required by this statute. (*Sanderson v. Wastley*, 8 Dowl. P. C. 412; 6 Mees. & W. 98; 4 Jur. 942.) An attestation of a warrant of attorney on behalf of the defendant, by an attorney, who, besides practising on his own account, was acting at the time as clerk to another attorney, and the latter was acting as attorney both for the plaintiff and defendant in the transaction, was held insufficient within this act. (*Durrant v. Burton*, 9 Dowl. P. C. 1015; 5 Jur. 825.) The attorney who subscribed the execution of a warrant of attorney for the defendants was the attorney of the plaintiffs; it was held that though the defendants were fully aware of the nature of the instrument, yet, as the attorney was not wholly uninterested, this was not a sufficient attestation within the 1 & 2 Vict. c. 110, s. 9. (*Deverell v. Thring*, 3 Jur. 1193, B. C.)

Form of
attestation.

The act applies to a *cognovit actionem* in an action of ejectment. (*Doe d. Rees v. Howell*, 4 Jur. 1035; *Doe d. Kingston v. Kingston*, 6 Jur. 105; 1 Dowl. P. C. N. S. 263.) The act does not apply to a defendant who is himself an attorney. (*Chipp v. Harris*, 5 Mees. & W. 430.) An attestation in this form, "Witness G. E. defendant's attorney, named by him, and attending at his request," is not sufficient without the attorney's proceeding to declare that he subscribed as such attorney. (*Poole v. Hobbs*, 8 Dowl. P. C. 113; *Potter v. Nicholson*, 8 Mees. & W. 294; 9 Dowl. P. C. 808; 5 Jur. 511.) If an attesting witness to a *cognovit* describe himself as "an attorney expressly named for the defendant, and that he declares and subscribes himself as such," this is a sufficient attestation under 1 & 2 Vict. c. 110, s. 9; and it is not necessary to state in the attestation that he has been appointed such attorney by the defendant. (*Oliver v. Woodroffe*, 3 Jur. 12, Exch.) It is not requisite under the 1 & 2 Vict. c. 110, s. 9, that the attorney to the defendant, in the attestation of a *cognovit*, should state himself to be an attorney named by the defendant; it is sufficient if he declares himself to be an attorney for the defendant; nor need the attorney be originally named by the defendant; it is sufficient if the latter adopts

the attorney named by the plaintiff. (*Oliver v. Woodroffe*, 7 Dowl. P. C. 166; 4 Mee. & W. 650; 3 Jur. 59.) And if the nature and effect of the instrument be explained to the defendant, it is immaterial that it has not been read over to him. (*Ib.*) An infant cannot bind himself by a cognovit. (*Ib.*)

A defendant may apply to set aside a warrant of attorney and judgment thereon, on the ground of a non-compliance with the statute, although he has become a bankrupt since the execution of the warrant. (*Taylor v. Nicholls*, 6 Mee. & W. 91; 4 Jur. 271.) Where a cognovit had been attested on behalf of the defendant by an attorney who accompanied the plaintiff's son to the defendant's residence, and who subsequently carried the instrument to the Queen's Bench office to be filed, and there subscribed his name upon the back of it, as the plaintiff's attorney's agent, the court set aside the instrument under the 1 & 2 Vict. c. 110, ss. 9 and 10. (*Rice v. Linstead*, 7 Dowl. P. C. 153; 6 Scott, 895.)

A consent to a judge's order for judgment and execution is not within the 9th section of the 1 & 2 Vict. c. 110, and therefore the order is valid, though neither the defendant nor his attorney attended before the judge. (*Braine v. Manson*, 9 Dowl. P. C. 748.)

The stat. 1 & 2 Vict. c. 110, s. 9, which regulates the mode of taking cognovits and warrants of attorney, does not apply to the case of a consent in writing, by a defendant, that a judge's order may be obtained to permit the plaintiff to sign judgment, unless the debt and costs are paid within a certain time. (*Thorne v. Neale*, 2 Gale & Dav. 48.)

X. That a warrant of attorney to confess judgment or *cognovit actionem*, not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same. (b) (3 & 4 Vict. c. 105, s. 11, Ireland.)

Warrant, &c.
not formally
executed in-
valid.

(b) The Irish stat. 3 & 4 Vict. c. 105, ss. 12—18, contains further regulations as to warrants of attorney. See stat. 3 Geo. 4, c. 39, for preventing frauds upon creditors by secret warrants of attorney, the provisions of which act are extended by 1 & 2 Vict. c. 110, s. 60, to assignees of insolvent debtors. The twenty-one days for filing a warrant of attorney under 3 Geo. 4, c. 39, s. 1, are to be reckoned exclusively of the day of execution; so that a warrant executed on 9th December, and filed on the 30th December, is in time. (*Williams v. Burgess*, 12 Ad. & Ell. 635.)

WRIT OF ELEGIT.

Sheriff empowered to deliver execution of lands to judgment creditor.

XI. And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedy against the real and personal estate of the debtors than they possess under the existing law, be it therefore further enacted, that it shall be lawful for the sheriff or other officer to whom a writ of *elegit*, or any precept in pursuance thereof, shall be directed at the suit of any person upon any judgment, which at the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty's superior courts at Westminster, to make and deliver execution upon the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards have any disposing power, which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out as a tenant by *elegit* is now subject to in a court of equity: Provided always, that such party suing

Proviso as to copyhold lands.

out execution, and to whom any copyhold or customary lands shall be so delivered in execution shall be liable, and is hereby required to make, perform, and render to the lord of the manor or other person entitled, all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render, in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: Provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case this act had not passed. (c) (3 & 4 Vict. c. 105, s. 19, Ireland.)

Provide as to
purchasers,
mortgagees,
and creditors.

(c) It is not proposed on the present occasion to enter upon the consideration of the law as to judgments before the passing of the above act, but the notes subjoined will, for the most part, be confined to the cases which have arisen upon the construction of the recent statute. For information on the effect of judgments under the old law, the reader is referred to 2 Sugd. V. & P. 381 to 394, 10th ed.; Coote on Mortgages; Powell on Mortgages, by Coventry; Bac. Abr. Execution, 3 vol. pp. 349—421, 7th ed.; Gilb. Law of Executions. See *ante*, pp. 229—231, 248—250.

By 1 Will. 4, c. 7, the judge before whom any action shall be tried may certify before the end of the sittings or assizes that execution ought to issue forthwith; in which case judgment may be signed, and execution issued. It is ordered, that where judgment is signed by virtue of a judge's certificate, given pursuant to the stat. 1 Will. 4, c. 7, s. 2, such judgment may be signed without any rule for judgment. (Reg. Gen. T. T. 4 Vict. 1841; 5 Jur. 426.)

Speedy execution.

After final judgment is signed upon a certificate for speedy execution under 1 Will. 4, c. 7, s. 2, the judge cannot order a stay of execution. (*Lander v. Gordan*, 7 Mees. & W. 218; 8 Dowl. P. C. 910.) In an action of trespass for mesne profits, it is in the power of the judge to certify for speedy execution. (*Lane v. Wycherley*, 4 Jur. 198; see *Yates v. Dublin Steam Packet Company*, 6 Mees. & W. 77; 4 Jur. 437.)

Staying execution.

What may be
taken in exe-
cution.

This statute has extended the remedy of the judgment creditor against the *whols*, instead of one *moiety* of the debtors' lands, including copyholds, which were not subject to execution under the old law. (See *ante*, p. 498.) By the old law leasehold estates were not bound, till delivery of a writ of execution to the sheriff, but an opinion has been expressed that leasehold estates are now bound in the same manner as freeholds, and an equity of redemption, which was not extendible before, (see 1 Ves. jun. 431; 3 Atk. 739; 2 Atk. 290; 3 Br. C. C. 478;) is now considered to be so, in the same manner as an equity of redemption in a fee simple estate. (2 Sugd. V. & P. 401, pl. 36, 10th ed.) It has been suggested that terms of years, as well equitable as legal, are not affected by judgments until execution, on the ground that the enactment is in the same words as the statute 29 Car. 2. c. 3, s. 10, which did not include chattel interests. (See 3 Jarm. Convey. by Sweet, 84.) By the old law, if an estate tail were extended, the issue might avoid it after the death of the tenant in tail. (*Ashburnham v. Lord St. John*, Cro. Jac. 85; Gilb. on Executions, 106.) As tenants in tail, where there is no protector, have a disposing power, without the assent of any other person, it is conceived that in such a case the issue will be bound by judgments entered up against the tenant in tail. The 13th section expressly declares that a judgment shall be binding as against the issue of the body and other persons, whom, without the assent of any other person, the debtor might have barred. Trust estates are liable to execution under the 11th section of the act, which extends to lands and hereditaments, of which the debtor, or any person in trust for him, shall have been seised at the time when the execution issued.

Where a trustee conveyed land before execution sued, though he was seised in trust for the defendant at the time of the judgment, the lands could not be taken in execution. (*Hunt v. Coles*, 1 Com. 226; see *Steele v. Phillips*, Beatty, 193; *Hickson v. Aylward*, 3 Molloy, 25.) It was decided that a trust created by a defendant in favour of himself and another person, is not a trust within the 29 Car. 2, c. 3, s. 10, that clause being confined to cases where the trustees are seised or possessed in trust for a defendant alone, and not jointly with another person, the trust within that statute being one of a clear and simple nature for the benefit of the debtor. (*Doe d. Hull v. Greenhill*, 4 B. & Ald. 684.) Soon after the passing of the act 1 & 2 Vict. c. 110, a doubt was raised, whether under the 14th section stock could be charged, in which the debtor had only a partial interest; and whether the construction of its terms must not be governed by that put on similar expressions in the statute of frauds, (see *Doe d. Hull v. Greenhill*, 4 B. & Ald. 684,) so as to be held to apply only to simple trusts for the debtor alone, and not to trusts where the stock is standing in the name of a trustee for several per-

ons having partial interests. But this doubt is removed by stat. 3 & 4 Vict. c. 82, which extends the provisions of the & 2 Vict. c. 110, s. 14, "to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any stocks, funds, or hares, as also in the dividends, interest, or annual produce of such stocks, &c." The stat. 3 & 4 Vict. c. 82, has also removed another doubt, whether the power of a judge to make a charging order applied to the case of stock standing in the name of the accountant general of the Court of Chancery, by declaring that it shall be lawful for a judge of any of the superior courts of law to make such order as to stock, &c. standing in the name of the accountant general of the Court of Chancery, or the interest or dividends thereof, in the same way as if the same were standing in the name of a trustee for the judgment debtor. But the order in such a case shall not operate to prevent a transfer or payment of the dividends by direction of the Court of Chancery.

Lands, of which a man is seised in right of his wife, are liable to execution. (Dalt. & Sher. 136; Coote on Mortgages, 67.) Personal chattels bequeathed to a single woman for her separate use, but without the intervention of any trustee, cannot be seized in execution by a judgment creditor of an after-taken husband. (*Newlands v. Paynter*, 4 My. & Cr. 408.) Where rent became due after the delivery of a writ of *elegit* to the sheriff, but before the inquisition was taken thereon, it was held that the execution creditor was not entitled to the rent. (*Sharp v. Key*, 8 Mees. & W. 379; 9 Dowl. P. C. 770.)

It is to be observed that by the 5th section of 2 & 3 Vict. c. 11, as against purchasers and mortgagees, *without notice* of any judgment, &c., none of such judgments, &c. shall bind or affect any lands, &c., or any interest therein, further or otherwise, or more extensively, although duly registered, than a judgment of one of such superior courts would have bound such purchaser or mortgagee before the stat. 1 & 2 Vict. c. 110. But nothing in either of the same acts shall affect any judgment as between the parties thereto, or their representatives, or those claiming as volunteers under them.

Further provision in favour of purchasers, without notice, &c.

WRIT OF FIERI FACIAS.

XII. That by virtue of any writ of *fiery facias* to be sued out of any superior or inferior court, after the time appointed for the commencement of this act, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof, may and shall seize and take any money

Sheriff empowered to seize money, bank notes, &c. and to pay money or bank notes to creditors, and

to see for
amount se-
cured by bills
of exchange
and other
securities.

or bank notes, (whether of the governor and company of the Bank of England, or of any other bank or bankers,) and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the person against whose effects such writ of *fiери facias* shall be sued out; and may and shall pay or deliver to the party suing out such execution, any money or bank notes, which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security or securities for the amount by such writ of *fiери facias* directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived, and that the payment to such sheriff or other officer, by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ, the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued; provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other

Proviso as to
indemnity of
sheriffs.

curity, unless the party suing out such execution shall enter into a bond, with two sufficient reties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action. (d). (3 & 4 Vict. c. 105, s. 20, Ireland.)

(d) The Irish stat. 3 & 4 Vict. c. 105, s. 21, contains a further provision for extending the appointment of a receiver in certain cases at the suit of creditors by judgment or recognition; and see 5 & 6 Will. 4, c. 55.

The 12th section of stat. 1 & 2 Vict. c. 110, gives no power to seize money in execution while in the hands of a third person, as trustee for the defendant; and therefore money deposited in court in one action, pursuant to 43 Geo. 3, c. 46, s. 2, and the 7 & 8 Geo. 4, c. 71, s. 2, cannot be paid out to an execution creditor in a second action, in satisfaction of his claim. (*France v. Campbell*, 6 Jur. 105.) If a sheriff under a *fieri facias* levies on and removes goods which are not the property of the judgment debtor, and has notice of rent due before the removal, he is liable to the landlord under stat. 8 Anne, c. 14, s. 1, although he has paid over the whole proceeds of the levy to the owner of the goods. (*Forster v. Cookson*, 1 Gale & D. 58; 5 Jur. 1083.) Property held by way of lien cannot be taken in execution under a *fi. fa.* either at common law, or since 1 & 2 Vict. c. 110, s. 12. (*Legg v. Evans*, 6 Mees. & W. 36; 8 Dowl. P. C. 177; 4 Jur. 197.) Where a defendant died between eleven and twelve o'clock in the morning, and a writ of *fi. fa.* was sued out against his goods between two and three in the afternoon of the same day, the court set aside the execution as irregular. (*Chick v. Smith*, 8 Dowl. P. C. 337; 4 Jur. 86, B. C.) A party privileged from arrest having been taken on a *ca. sa.* by the sheriff of G., paid the money to the sheriff and obtained a judge's order to have it refunded. When the town agent was about to do so, the money was claimed by the sheriff of M. under a *fi. fa.* directed to him: it was held that the money could not be taken under the *fi. fa.* (*Masters v. Stanley*, 8 Dowl. P. C. 169; 4 Jur. 28, Exch.) The surplus of the proceeds of property sold under a *fi. fa.* remaining in the hands of the sheriff after satisfying the execution creditors, is a debt due from the sheriff to the debtor, and cannot be taken in execution under a *fi. fa.* at the suit of a third party, against the defendant in the former suits. (*Harrison v. Paynter*, 6 Mees. & W. 387; 8 Dowl. P. C. 349; 4 Jur. 488.) Where a sheriff, who had seized and sold certain goods under a writ of *fieri facias*, kept the money

What cannot be taken under the statute.

in his hands in consequence of a suit in equity between the parties respecting the amount due to the plaintiff: it was held that the writ must be considered as wholly executed, and ought not, on the sheriff's going out of office, to be transferred to his successor under 3 & 4 Will. 4, c. 99, s. 7. (1b.) A defendant having obtained judgment against F., lodged a *fi. fa.* with the deputy (under stat. 3 & 4 W. 4, c. 42, s. 20,) of the sheriff, and the deputy immediately issued a warrant to an officer. Afterwards, on the same day, a vesting order was made (under stat. 1 & 2 Vict. c. 110, s. 37) by the Insolvent Debtors' Court, transferring the estate of F. The assignee under this order took possession of F.'s property, and afterwards the sheriff's officer seized it: it was held that the seizure was proper. (*Woodland and another v. Fuller and another*, 11 Ad. & Ell. 859; see 1 & 2 Vict. c. 110, s. 46.)

Fixtures.

There is no doubt that by a conveyance, whether to a purchaser or to a mortgagee, fixtures annexed to the freehold will pass, unless there be some words in the deed to exclude them. (*Colegrave v. Dias Santos*, (2 B. & Cr. 76; 3 D. & R. 255) is an authority to that effect in the case of a purchaser, and *Leagstaffs v. Meagoe*, (2 Ad. & El. 167) in the case of a mortgagee. (See *Steward v. Lombe*, 1 Brod. & B. 506; *Boydell v. M'Michael*, 1 Cr. M. & R. 177.) Fixtures cannot generally be treated as goods and chattels until detached from the freehold. (*Nutt v. Butler*, 5 Esp. 176; *Lee v. Risdon*, 2 Marsh. 496; *Niblett v. Smith*, 4 T. R. 504.) In a *fi. fa.* against a lessee, who may himself remove them, they may be taken. (*Placer v. Fagg*, 4 Man. & R. 277, per Bayley, J.; *Winn v. Ingilby*, 5 B. & Ald. 625; 1 D. & R. 247; *Pitt v. Shew*, 4 B. & Ald. 206; *Evans v. Roberts*, 5 B. & C. 841; 8 D. & R. 611.)

THE EFFECT OF A JUDGMENT.

Judgment to operate as a charge on real estate.

XIII. That a judgment already entered up, or to be hereafter entered up against any person in any of her Majesty's superior courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments, (including lands and hereditaments of copyhold or customary tenure,) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seized, possessed of, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up

such judgment, or at any time afterwards, have
 any disposing power, which he might without the
 assent of any other person exercise for his own
 benefit, and shall be binding as against the person
 against whom judgment shall be so entered up,
 and against all persons claiming under him after
 such judgment, and shall also be binding as
 against the issue of his body, and all other per-
 sons whom he might, without the assent of any
 other person, cut off and debar from any remain-
 der, reversion, or other interest, in or out of any
 of the said lands, tenements, rectories, advowsons,
 tithes, rents, and hereditaments; and that every
 judgment creditor shall have such and the same
 remedies in a court of equity against the here-
 ditaments so charged by virtue of this act or any
 part thereof, as he would be entitled to in case the
 person against whom such judgment shall have
 been so entered up had power to charge the same
 hereditaments, and had by writing under his hand
 agreed to charge the same, with the amount of
 such judgment debt and interest thereon: Pro-
 vided that no judgment creditor shall be entitled
 to proceed in equity to obtain the benefit of such
 charge until after the expiration of one year from
 the time of entering up such judgment, or in
 cases of judgments already entered up, or to be
 entered up, before the time appointed for the
 commencement of this act, until after the expi-
 ration of one year from the time appointed for the
 commencement of this act, nor shall such charge
 operate to give the judgment creditor any pre-
 ference in case of the bankruptcy of the person
 against whom judgment shall have been entered
 up, unless such judgment shall have been entered
 up one year at least before the bankruptcy:
 Provided also, that as regards purchasers, mort-
 gagees, or creditors, who shall have become such
 before the time appointed for the commencement
 of this act, such judgment shall not affect lands,
 tenements, or hereditaments, otherwise than as
 the same would have been affected by such judg-

Charge not to
 be enforced
 until after
 expiration of
 a year.

Proviso as to
 purchasers.

ment if this act had not passed : (c) Provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity, whereby protection is given to purchasers for valuable consideration without notice. (J) (3 & 4 Vict. c. 105, s. 22, Ireland.)

(e) In a bill for a foreclosure and sale of mortgaged land all the judgment creditors of the mortgagor are necessary parties, whether such judgments are prior or *pari passu* to the plaintiff's demand, and whether they are a lien upon legal or equitable estates. This doctrine rests upon a perfectly valid foundation, whether referred to the general principles of courts of equity, or to the effect of the stat. 3 & 4 Vict. c. 105, s. 22. That which formerly, by force of the statute of Westminster, 13 Edw. I. st. 1, c. 18, was a general charge upon lands, now by force of the express directions of the stat. 3 & 4 Vict. c. 105, s. 22, becomes a specific charge; words cannot be more express. If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them; and a court of equity will execute the charge. When the act of parliament says, that every judgment creditor shall have the same remedies in a court of equity as he would be entitled to in case the person, against whom the judgment has been entered, had agreed to charge the lands with the amount of that judgment debt, whether that charge be legal or equitable, the judgment becomes, in the view of a court of equity, an equitable estate. We are no longer dealing with a general lien, but with a specific incumbrance. (*Rollaston v. Martin*, 1 Drury & War. 171, 195; 1 Conn. & L. 252.)

Before the above act, a judgment creditor, who desired to enforce his security against his debtor's equitable interest in a freehold estate by a bill in equity, must previously have sued out an *elegit*; and if his bill did not allege that he had done so, it was demurrable. (*Neute v. Duke of Marlborough*, 3 Mylne & Cr. 407.)

The stat. 6 Will. 4, c. 14, s. 126, which deprived creditors, who have obtained judgments by confession against their debtor, of preference in bankruptcy, has not been repealed by the effect of 3 & 4 Vict. c. 105. Creditors by simple contract come within the terms of the above proviso in 3 & 4 Vict. c. 105, s. 22, with respect to purchasers, mortgagees, or creditors. (*In re Perrin*, 2 Drury & Warren, 147.)

Contribution.

If part of an estate subject to a judgment is sold, leaving the remainder in the hands of the consor, and execution is taken out against the original debtor or his heir, he will not be entitled to contribution against the purchaser; but if the execution had been against the purchaser only, he will be entitled to contribution against the owner of the residue of the estate. (3 Rep. 11 b; *Hartly v. O'Flaherty*, Beatty, 61; and

see sect. 13 of 1 & 2 Vict. c. 110, 16 & 17 Car. 2, c. 5.) A party seized of several real estates, and indebted by judgment, settles one of the estates for valuable consideration, with a covenant against incumbrances, and subsequently acknowledges other judgments, it was held that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estate contribute. (*Averall v. Wade*, Lloyd & G. temp. Sugd. 252.)

(f) The Irish act 3 & 4 Vict. c. 105, s. 22, contains the additional proviso, "that nothing in this act contained shall take away or prejudice any remedy or proceeding which any judgment creditor may, or if this act had not been passed might, have or take in relation to his judgment; but such creditor shall be at liberty to proceed at law or in equity for recovery of any sum secured by or due upon any such judgment, whether before or after such period as aforesaid, as if this act had not been passed."

CHARGE UPON STOCK, &c.

XIV. That if any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster, shall have any government stock, funds or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order. (g) (3 & 4 Vict. c. 105, s. 23, Ireland.)

Stock and shares in public funds and public companies belonging to the debtor and standing in his own name to be charged by order of a judge.

(g) The provisions of this section are defined and extended by stat. 3 & 4 Vict. c. 82, s. 1. (See post.) A judge of the Court of Chancery is not a judge of one of the superior courts at Westminster, within the meaning of the 14th section 1 & 2 Vict. c. 110, and has no jurisdiction under that section to order monies invested in the name of the accountant-general to stand charged with a judgment debt recovered at law against the party entitled to such funds, but the application should be made to one of the common law judges of the superior courts at Westminster. (*Miles v. Prossland*, 4 My. & Cr. 431; 2 Beav. 300.) In *Robinson v. Pearce*, (7 Dow. 93; 2 Jur. 896,) it was held that money deposited by the vendee of land in the hands of a third party, for the use of the defendant, could not be attached under stat. 1 & 2 Vict. c. 110, s. 14, and that the 12th section only applied to money in the hands of the debtor, and not in the possession of a third party as trustee for him. A judge at chambers only, and not the court, has authority under the statute 1 & 2 Vict. c. 110, s. 14, to make an order to charge a fund with the payment of money recovered by a judgment; if he makes an absolute order, the court has jurisdiction to set it aside if wrongly made; but if he only makes an order *nisi*, the court has no authority to entertain the question, although the judge expresses his desire to refer it to the court. (*Brown v. Bamford*, 9 Mees. & W. 42.)

OPERATION OF JUDGE'S ORDERS.

Order of judge to be made in the first instance *ex parte*, and on notice to the bank or company to operate as a *distringas*.

XV. And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares hereby authorized to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted, that every order of a judge charging any government stock, funds or annuities, or any stock or shares in any public company, under this act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds, or annuities, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be

made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation; and before the same order shall be discharged or made absolute, such corporation, or person or persons, shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit. (h) (3 & 4 Vict. c. 105, s. 24, Ireland.)

(h) The 5 Vict. c. 5, s. 5, enacts, that, in the place and instead of the writ of distringas, as the same has been heretofore issued from the said Court of Exchequer, a writ of distringas, in the form set out in the first schedule to this act, shall, on and after the said 15th day of October, 1841, be issuable from the Court of Chancery, and shall be sealed at the subpoena office, and that the force and effect of such writ, and the practice under or relating to the same, shall be such as is now in force in the said Court of Exchequer: provided, nevertheless, that such writ, and the practice under or relating to the same, and the fees and allowances in respect thereof, shall

Writ of distringas to be issued from Court of Chancery according to form in first schedule to act 5 Vict. c. 5.

be subject to such orders and regulations as may, under the provisions of this act, or of any other act now in force, be made under the general authority of the Court of Chancery, in made with reference to the proceedings and practice of the said Court of Chancery. (See order of court, 17th November 1841, as to *distringas*.) The stat. 5 Vict. c. 5, s. 4, has conferred on the court no new summary jurisdiction with respect to granting injunctions; but the remedy provided thereby was intended only for limited and interim purposes, viz. to protect stock until the party having a claim to it can have time to assert that claim by bill. H. obtained a restraining order under the above statute on the 30th May, but he neglected to file a bill; upon motion made the 30th June to discharge the order, it was held, first, that the order could not stand without a bill filed; and, secondly, that although the court had power to continue the order until a bill should be filed, yet that this was not, by reason of H.'s delay in filing a bill, the proper case for the exercise of such power. (*In re Sains*, 6 Jur. 597.)

Form of writ. "VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to the sheriffs of London greeting:—We command you that you omit not by reason of any liberty, but that you enter the same and distrain the governor and company of the Bank of England by all their lands and chattels in your bailiwick, so that they, or any of them, do not intermeddle therewith until we otherwise command you; and that you answer us the issues of the said lands, so that they do appear before us in our High Court of Chancery on the — day of —, to answer a certain bill of complaint lately exhibited against them and other defendants before us in our said Court of Chancery by — complainant; and further to do and receive what our said court shall then and there order in the premises, and that you then leave there this writ. Witness ourself at Westminster, the — day of —, in the — year of our reign.

"Devon."

The following is the form of the affidavit which has been substituted by the judges of the Court of Chancery by an order dated 10th December, 1841, for the form set out at the foot of the orders of the 17th November, 1841.

A. B. [*the name of the party or parties in whose behalf the writ is sued out*] v. The Governor and Company of the Bank of England.

I, — of —, do solemnly swear, that, according to the best of my knowledge, information, and belief, I am [*or if the affidavit is made by a solicitor, A. B. of — is*] beneficially interested in the stock hereinafter particularly described, that is to say [*here specify the amount of the stock to be affected by the writ, and the name or names of the person or persons, or body politic or corporate, in whose name or names the same shall be standing.*]

EFFECT OF TAKING THE BODY.

XVI. That if any judgment creditor, who under the powers of this act shall have obtained any charge, or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly. (3 & 4 Vict. c. 105, s. 25, Ireland.) (i)

Securities not realized to be relinquished if the person be taken in execution.

(i) In *Wells v. Gibbs*, (3 Beav. 399,) a question was raised whether an order to pay money into court to the credit of a cause is an order within the meaning of 1 & 2 Vict. c. 110, s. 18, and if so, whether a taking under an attachment for contempt would, under the 16th section, invalidate a charge obtained under the 13th section. The court said it certainly is not the same thing as a taking under a *ca. sa.* at law; nor is this court bound by the decisions of courts of law, which in some cases prohibit a party proceeding against the property and person at the same time. (See *Hide v. Pettitt*, 1 Ch. Ca. 91.) The two concurrent processes have at all times existed in this court, and still exist, so that if a defendant should remain in prison, and neglect to pay money according to the order of the court, a sequestration would go against his estate.

INTEREST ON JUDGMENTS.

XVII. That every judgment debt shall carry interest at the rate of 4*l.* per centum per annum from the time of entering up the judgment, or from the time of the commencement of this act in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment. (k) (3 & 4 Vict. c. 105, s. 26, Ireland.)

Judgment debts to carry interest.

(k) See *ante*, pp. 258—260. Where judgment was signed, and the allocatur dated on the 8th January, but in consequence of the delay by the plaintiff moving to review the taxation, (ultimately increased), it was not entered up until the 30th May; it was held, upon the construction of this section, that the judgment was to be taken as entered on the former day, the original entry being merely a misprision of the clerk. (*Fisher v. Dudding*, 9 Dowl. P. C. 872.)

DECREES AND ORDERS IN EQUITY.

Decrees and orders of courts of equity, &c. to have effect of judgments.

XVIII. That all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the court of review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies or costs, charges or expenses, shall be payable shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the court of review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies or costs, charges or expenses, are by such orders or rules respectively directed to be paid. (l) (3 & 4 Vict. c. 105, s. 27, Ireland.)

(l) The Irish act contains the additional words, "and the date of the same, and the amount due on the foot thereof, shall be stated in any petition for a receiver under the said act, 5 & 6 Will. 4, c. 55, and this act, as in the case of a petition founded on a judgment entered or recovered in any such superior courts of law as aforesaid."

Order charging stock.

Stock standing in the accountant-general's name to the

separate account of a party against whom a judgment debt has been recovered, may be charged under 1 & 2 Vict. c. 110, with the debt; but the charging order must be made, not by a judge in equity, but by a judge at common law; and although such order, in terms, charges the stock, it affects only the interest of the debtor in the stock, and therefore does not interfere with the rights of prior incumbrancers. A court of equity will make a stop order as auxiliary to the charging order. A party intending to apply for a stop order must give notice of his application to all other persons having like orders on the funds. (*Hulkes v. Day*, 10 Sim. 41; 4 Jur. 1125.) Courts of equity will carry into execution their orders for decrees and costs, by charging the government stock of the debtor under the provisions of the statute 1 & 2 Vict. c. 110; and for that purpose it is not necessary to give further proof of application for payment than is contained in the notice of the intended application to make the order for the charge absolute. (*Blake v. White*, 3 Y. & Coll. 434; 3 Jurist, 749.) Under an agreement of reference a sum was awarded to be paid by the plaintiff to the defendant; and afterwards the agreement was made a rule of court. It was held that the plaintiff could not, by virtue of the rule of Court, issue execution for the sum under the statute 1 & 2 Vict. c. 110, s. 18, that clause being applicable, for such purpose, only where the money payable by the rule is expressed in the rule itself. (*Jones v. Williams*, 11 Ad. & Ell. 175; 4 P. & Dav. 217.) A judge's order for payment of money obtained *ex parte* cannot be made the foundation of an execution under stat. 1 & 2 Vict. c. 110, s. 18. (*Rickards v. Patterson*, 1 Dowl. P. C., N. S. 52; 8 Mees. & W. 313; 5 Jur. 894. See *Neale v. Postlethwaite*, 8 Dowl. P. C. 100, O. S.) A party to whom a sum of money has been made payable by a rule of court is entitled under this section to sue out execution for the amount, without any leave obtained from the court for that purpose. (*Wallis v. Sheffield*, 3 Jur. 1002.)

The above words, "monies or costs, charges or expenses," mean money decreed or ordered to be paid, together with the costs, &c. to be ascertained on taxation by the officer of the court, and that no order to pay costs is requisite. (*Jones v. Williams*, 8 Mees. & W. 349; 9 Dowl. P. C. 702; 6 Jur. 895.) A person may sue out execution under 1 & 2 Vict. c. 110, on a rule of court ordering costs alone to be paid, though there is no form of writ, as settled by the common law judges, applicable to costs only. (*Anon.* 5 Jur. 40.) An order of the Court of Chancery requiring the defendants in a suit to pay a certain sum into the Bank, with the privy of the Accountant-General, to the credit of the cause, is not an order which has the effect of a judgment within the provisions of 1 & 2 Vict. c. 110. (*Gibbs v. Pike*, 8 Mees. & W. 223; 9 Dowl. P. C. 131.)

NEW REGISTER.

No judgment, decree, &c. to affect real estate otherwise than as before the act, until registered.

XIX. That no judgment of any of the said superior courts, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, shall by virtue of this act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court and title of the cause or matter in which such judgment, decree, order, or rule, shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account of the debt, damages, costs, or monies thereby recovered or ordered to be paid, shall be left with the senior master of the court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and such officer shall be entitled for any such entry to the sum of 5s.; and all persons shall be at liberty to search the same book on payment of the sum of 1s. (3 & 4 Vict. c. 105, s. 28, Ireland.) (m)

(m) See 2 & 3 Vict. c. 11, ss. 2—4.

NEW WRITS.

New writs to be framed.

XX. That such new or altered writs shall be sued out of the courts of law, equity, and bankruptcy, as may by such courts respectively be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order;

and the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or as near hereto as the circumstances of the cases will admit; and that any existing writ, the form of which shall be in any manner altered in pursuance of this act, shall nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this act. (n)

(n) Forms of writs were framed by the judges pursuant to this statute, and it was ordered that such forms should be used from and after the 1st of March, 1840, with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary; but that any variance, not being in matter of substance, shall not affect the validity of the writs sued out. (See forms of writs of *elegit* and *feri facias*, 3 Jur. 86—91; 9 Ad. & Ell. 986—998; 1 Per. & Da. 313; 5 Bing. N. C. 366; 7 Scott, 1; 4 Mee. & W. 546; and forms of writs of execution, *capias ad satisfaciendum* as framed by the judges pursuant to the 1 & 2 Vict. c. 110; 6 Bing. N. C. 330; 3 Per. & D. 381; 6 Mees. & W. 2; 1 Scott, N. R. 2; 4 Jur. 176; 11 Ad. & Ell. 602. See orders for the regulation of the practice and proceedings of the Court of Chancery with the forms of writs of *feri facias*, *elegit*, and *venditioni exponas*, 9 May, 1839; 4 My. & Cr. Appendix; 3 Jur. 410.) A party is entitled to his *fi. fa.* on the lapse of a month, mentioned in the 1st order of 9th May, 1839, notwithstanding he has not complied with the requisitions of the 12th order of 12th August, 1841. (*Streater v. Whitmore*, 6 Jur. 92.)

COURTS OF LANCASTER AND DURHAM.

XXI. That all the remedies, authorities and provisions of this act applicable to her majesty's superior courts of common law at Westminster, and the judgments and proceedings therein, shall extend to and be applicable to the court of common pleas of the county palatine of Lancaster and the court of pleas of the county palatine of Durham, within the limits of the jurisdiction of the same courts respectively; and the judgments of Powers, &c. of this act applicable to the courts and judges at Westminster, to be applicable to courts of Lancaster and Durham.

each of the said last mentioned courts shall, within the limits of the jurisdiction of the same courts respectively, have the same effect in all respects as the judgments of any of her majesty's said superior courts at Westminster, under and by virtue of this act; and all powers and authorities hereby given to the judges or any judge of her majesty's superior courts at Westminster, with respect to matters depending in the same courts, shall and may be exercised by the judges or any judge of the said court of common pleas at Lancaster or the justices or any justice of the said court of pleas at Durham, with respect to matters therein depending, and within the jurisdiction of the same courts respectively: Provided always, that no judgment of either of the same last mentioned courts shall by virtue of this act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name and the usual or last known place of abode, and title, trade, or profession of the plaintiff and defendant, the date when such judgment was signed, and the amount of the debt, damages, and costs thereby recovered, shall be left with the prothonotary, or deputy prothonotary, or some other officer to be appointed for that purpose by the said courts respectively, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the person whose estate is to be affected thereby; and such officer shall be entitled for every such entry to the sum of 2s. 6d.; and all persons shall be at liberty to search the same book on payment of the sum of 1s.: And provided also, that no order or other proceeding under this act, made by any justice or justices of the said court of common pleas of the county palatine of Lancaster, or the court of pleas in the county palatine of Durham, shall be valid or effectual except made in open court on one of the court or return days of the same court, or except such justice or justices shall be also a judge or judges of one of the said courts at Westminster:

Provided also, that no order directing any person or persons to be held to bail under this act, nor any order for discharging out of custody any person or persons arrested under this act, shall be made by any justice or justices of the court of pleas in the county palatine of Durham who shall not be a judge or judges of one of the said courts of common law at Westminster. (c)

(c) The Court of Chancery has no jurisdiction to order the master of the Common Pleas to vacate a memorandum entered under 1 & 2 Vict. c. 110, of an order of the former Court. (*Wells v. Gibbs*, 3 Beav. 399.)

JUDGMENTS OF INFERIOR COURTS.

XXII. That in all cases where final judgment shall be obtained in any action or suit in any inferior court of record, in which at the time of passing this act a barrister of not less than seven years' standing shall act as judge, assessor, or assistant in the trial of causes, and also in all cases where any rule or order shall be made by any such inferior court of record as aforesaid whereby any sum of money or any costs, charges, or expenses shall be payable to any person, it shall be lawful for the judges of any of her majesty's superior courts of record at Westminster, or if such inferior court be within the county palatine of Lancaster, for the judges of the court of common pleas at Lancaster, or for any judge of any of the said courts at chambers, either in term or vacation, upon the application of any person who at the time of the commencement of this act shall have recovered, or who shall at any time thereafter recover such judgment, or to whom any money or costs, charges or expenses shall be payable by such rule or order as aforesaid, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, such record or rule or order,

For removal
of judgment
of inferior
courts.

as the case may be, being respectively under the seal of the inferior court and the signature of the proper officer thereof, to order and direct the judgment, or as the case may be, the rule or order of such inferior court, to be removed into the said superior court, or into the court of common pleas at Lancaster, as the case may be, and immediately thereupon such judgment, rule, or order shall be of the same force, charge, and effect as a judgment recovered in or a rule or order made by such superior court, and all proceedings shall and may be immediately had and taken thereupon or by reason or in consequence thereof, as if such judgment so recovered or rule or order so made had been originally recovered in or made by the said superior court, or into the court of common pleas at Lancaster, as the case may be; and all the reasonable costs and charges attendant upon such application and removal shall be recovered in like manner as if the same were part of such judgment or rule or order: Provided always, that no such judgment or rule or order, when so removed as aforesaid, shall affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, any further than the same would have done if the same had remained a judgment, rule, or order of such inferior court, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same. (p)

(p) Where a judgment is removed from an inferior court for execution under 1 & 2 Vict. c. 110, the court will only enforce the judgment, and will not inquire into the regularity of previous proceedings below. (*Simons v. Count de Wintz*, 8 Dowl. P. C. 646.) A final order or decree of the vice-warden of the Stannary Courts, on the equity side, may be removed into the Court of Queen's Bench, the defendant having gone out of the jurisdiction, in order to issue execution pursuant to 1 & 2 Vict. c. 110, s. 22. (*Harvey v. Gilbard*, 7 Dowl. P. C. 616; 3 Jur. 316.) Under that statute such an order or decree may be made a rule of the Court of Queen's Bench by a rule absolute in the first instance. (*Ib.*; see 7 Dowl. P. C. 525.)

2 & 3 VICTORIA, c. 11.

An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fiats in Bankruptcy.

[4th June, 1839.]

DOCKETS TO BE CLOSED.

WHEREAS it is desirable that further protection should be afforded to purchasers against judgments, crown debts, and lis pendens; be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That no judgment shall hereafter be docketed under the provisions of an act passed in the fourth and fifth years of the reign of their late majesties King William and Queen Mary, intituled "An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas, and Exchequer, at Westminster," but that all such dockets shall be finally closed immediately after the passing of this act, without prejudice to the operation of any judgment already docketed and entered under the said recited act, except so far as any such judgment may be affected by the provisions hereinafter contained. (g)

No judgments to be hereafter docketed under the provisions of 4 & 5 W. & M. c. 20.

(g) By stat. 4 & 5 W. & M. c. 20, made perpetual by 7 & 8 Will. 3, c. 36, s. 3, judgments were directed to be docketed in alphabetical order; and it was declared that no judgments should affect lands or tenements as to *bond fide* purchasers, unless docketed and entered according to the act. Docketing the issue is not a sufficient docketing of a judgment within the provisions of the above act. (*Braithwaite v. Watts*, 2 Cr. & J. 318; 2 Tyr. 293.) Formerly the court had no power to alter a docket by directing a judgment to be docketed *nunc pro tunc*. (*Hopwood v. Watts*, 5 B. & Ad. 1056.) And under the rule 3 Hil. T., 4 Will. 4, made pursuant to the stat. 3 & 4 Will. 4, c. 42, s. 1, the court will not allow judgment to be entered *nunc pro tunc*, except in cases where the delay has arisen from the act of the court. (*Vaughan v. Wilson*, 4 Bing. N. C. 116.)

DOCKETED JUDGMENTS TO BE ENTERED PURSUANT
TO STAT. 1 & 2 VICT. c. 110.

As to judgments already docketed.

II. That no judgment already docketed and entered under the said recited act of their late majesties King William and Queen Mary shall, after the first day of August one thousand eight hundred and forty-one, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until such memorandum or minute thereof as is prescribed in an act passed in the first and second years of her present majesty Queen Victoria, intituled "An Act for abolishing Arrest on Mesne Process and Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England," shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same in manner thereby directed in regard to judgments; and such officer shall be entitled for any such entry to the sum of five shillings. (r)

1 Vict. c. 110.

(r) See *ante*, p. 538.

DATE OF MINUTE.

The date when the memorandum of judgment is left to be entered in a book.

III. That in addition to the entry by the said last-mentioned act or by this act required to be made in a book by the senior master, of the particulars to be contained in every memorandum or minute left with him of any judgment, decree or order, rule or order, he shall insert in such book the year and the day of the month when every such memorandum or minute is so left with him.

JUDGMENTS TO BE REGISTERED PERIODICALLY.

Judgments, after five years from entry, to be void, unless

IV. That all judgments of any of the superior courts, decrees or orders in any court of equity, rules of a court of common law, and orders in bankruptcy or lunacy, which since the passing of

the said recited act of the first and second years of the reign of her present majesty have been registered under the provisions therein contained, which shall hereafter be so registered, shall, after the expiration of five years from the date of the entry thereof, be null and void against lands, tenements, and other hereditaments, as to purchasers, mortgagees, or creditors, unless a like memorandum or minute as was required in the first instance is again left with the senior master of the said Court of Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors, within five years before the right of such creditors accrued, and so, *toties quoties*, at the expiration of every succeeding five years; and the senior master shall forthwith re-enter the same in like manner as the same was originally entered; and such officer shall be entitled for any such re-entry to the sum of one shilling. (s)

a fresh memorandum is left.

(s) The search for judgments on a purchase or mortgage was rarely carried back beyond twenty years, because the lapse of that period raised, as has been already stated, the presumption of satisfaction; (*ante*, pp. 248, 249;) and now, by stat. 3 & 4 Will. 4, c. 27, s. 40, no action or suit or other proceeding shall be brought to recover any sum of money secured by any judgment but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless the charge be kept alive by part payment, or by some written acknowledgment. (See *ante*, pp. 228—231.) The search for judgments need not be extended beyond five years, because the stat. 2 & 3 Vict. c. 11, s. 2, (see *ante*, p. 546,) has provided that no judgment already docketed under 4 & 5 W. & M. c. 20, shall, after the 1st August, 1841, affect any lands as to purchasers, mortgagees, or creditors, unless and until the minute thereof prescribed by the 1 & 2 Vict. c. 110, s. 19, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same in manner thereby directed in regard to judgments. The 4th section of 2 & 3 Vict. c. 11, has further provided that all judgments, decrees or orders, rules and orders, which had been

Search for judgments.

registered under the 1 & 2 Vict. c. 110, or which thereafter should be so registered, are, in order to bind purchasers, mortgagees, or creditors, to be again registered every five years. With respect to the question, in what cases search should be made for judgments? it is said the answer is, that in *no case* should a purchaser now dispense with such a search. It is no longer safe to rely upon an outstanding legal estate; the execution of a power will not defeat the judgment; (see *ante*, p. 282;) and it binds equitable as well as legal estates, powers amounting to ownership as well as actual estates. Even the most solvent person may have an order of some court against him for payment of costs, which the person obtaining it may choose to make binding upon purchasers; and although the provision in the stat. 2 & 3 Vict. c. 11, s. 5, is a great safeguard to purchasers, yet it would not be wise to rely upon it, as notice may be proved by slight circumstances. "And the register of judgments should be searched, although the estate lie in a register county." (2 Sugd. V. & P. 402, 403, 10th ed.) In purchasing from a tenant in tail or remainder man it will be necessary to search for judgments against the preceding tenants in tail. (See *ante*, 526.) A purchaser should also search the Court of Common Pleas for deeds substituted for fines and recoveries, as well as the index of the certificates of acknowledgments of deeds by married women; in which index the names of married women and their husbands are alphabetically arranged. (See 3 & 4 Will. 4, c. 74, s. 87, *ante*, p. 384.)

Facility is given for searches for crown debts, or a *quietus* in respect of them, by the 8th and 9th sections of this act; but the existence of debts incurred before the 4th June, 1839, must be ascertained by the old mode. (See *post*, p. 550, 554.)

Where a vendor, from inability to make out a title, fails to complete a contract for the sale of an estate, the purchaser is entitled to recover the expense of comparing deeds, of searching for judgments, and of journeys for that purpose, and interest on his deposit money. Unless judgments are searched for at an early stage of the proceedings, great expense may afterwards be incurred unnecessarily; and for the same reason, the comparison of deeds with the abstract should be early. (*Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492, 499. See *Lodge v. Lysely*, 4 Sim. 75; *Foster v. Blackstone*, 1 Myl. & K. 259; *Forth v. Duke of Norfolk*, 4 Madd. 504.)

PURCHASERS WITHOUT NOTICE.

V. That as against purchasers and mortgagees without notice of any such judgments, decrees or orders, rules or orders as aforesaid, none of such judgments, decrees or orders, rules or orders, shall bind or affect any lands, tenements, or heredita-

Judgments
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ments, or any interest therein, further or otherwise more extensively in any respect, although duly registered, than a judgment of one of the superior courts aforesaid would have bound such purchaser mortgagee before the said act of the first and second years of the reign of her present majesty, were it had been duly docketed according to the law then in force.

EXTINCT JUDGMENTS.

VI. That nothing in the said recited act of her present majesty nor in this act contained shall extend to revive or restore any judgment which shall be extinguished or barred, nor shall the same extend to affect or prejudice any judgment between the parties thereto, or their representatives, or those deriving as volunteers under them.

Not to revive judgments already extinguished or barred.

REGISTRY OF LIS PENDENS.

VII. That no lis pendens shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession, of the person whose estate is intended to be affected thereby, and the court of equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such lis pendens; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and the provisions hereinbefore contained in regard to the re-entering of judgments every five years, and the fee payable to the officer thereon, shall extend to every case of lis pendens which shall be registered under the provisions of this act. (t)

Purchasers not to be affected by any lis pendens, unless such suit is duly registered as directed by this act.

(t) As to *lis pendens*, see *Kinsman v. Kinsman*, 1 Russ. &

My. 617 ; Powell on Mortgages, by Coventry, 1 vol. 541—547 ; 3 Sugd. V. & P. 458—462, 10th ed.

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REGISTRY OF CROWN DEBTS.

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chasers, un-
less duly
registered as
directed by
this act.

33 Hen. 8,
c. 30.

13 Eliz. c. 4.

VIII. That no judgment, statute, or recognizance which shall hereafter be obtained or entered into in the name or upon the proper account of her majesty, her heirs or successors, or inquisition by which any debt shall be found due to her majesty, her heirs or successors, or obligation or specialty which shall hereafter be made to her majesty, her heirs or successors, in the manner directed by an act passed in the thirty-third year of the reign of his late majesty King Henry the Eighth, intituled "The Erection of the Court of Surveyors of the King's Lands, and the Names of the Officers there, and their authority," or any acceptance of office which shall hereafter be accepted by officers whose lands shall thereby become liable for the payment and satisfaction of arrearages under the provisions of the act passed in the thirteenth year of the reign of her late majesty Queen Elizabeth, intituled "An Act to make the Lands, Tenements, Goods, and Chattels of Tellers, Receivers, et cætera, liable to the Payment of their Debts," shall affect any lands, tenements, or hereditaments, as to purchasers or mortgagees, unless and until a memorandum or minute, containing the name and the usual or last place of abode, and the title, trade, or profession, of the person whose estate is intended to be affected thereby, and also in the case of any judgment the court and the title of the cause in which such judgment shall have been obtained, and the date of such judgment, and the amount of the debt, damages, and costs thereby recovered, and also in the case of a statute or recognizance the sum for which the same was acknowledged, and before whom the same was acknowledged, and the date of the same, and also

the case of an inquisition the sum thereby found be due, and the date of the same, and also in the case of an obligation or specialty the sum in which the obligee shall be bound, or for which the obligation or specialty shall be made, and the date of the same, and also in the case of acceptance of office the name of the office and the time of the officer accepting the same, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book, to be intituled "The Index to Debtors and Accountants to the Crown," in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, statute, recognizance, inquisition, obligation, or specialty, or the acceptance of any office; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book, and also the other book to be kept according to the provisions of the said recited act of the first and second years of the reign of her present majesty, in either of the said books, on payment of the sum of one shilling, whether one only or both of the said books shall be searched, and no multiplication of books is to increase the fee. (u)

Registry to be open to inspection.

(u) The statute 13 Eliz. c. 4, enumerates a great many officers of the Crown, and renders their lands liable to crown debts. That statute is repealed as to *receivers of customs*, by the 6 Geo. 4, c. 105, s. 13, (see 6 Geo. 4, c. 106, s. 7.) In *Wilde v. Fort*, 4 Taunt. 334, a commissioner of Dutch property, who was directed by statute to pay the surplus of certain sales into the Bank of England, subject to the orders of the king in council, was considered to come within the words "receiver of any sums of money, imprest or otherwise, for the use of the crown." Money imprest by the crown is money advanced for the purpose of being employed by the party for the use of the crown. (6 Price, 424.) But in *Casbard v. Ward and the Attorney-General*, (6 Price, 411,) it was held that a collector of assessed taxes is not a collector or receiver of money to the use of the king's majesty, within the purview of the statute. (See 16 Vin. Abr. 527—529. See 43 Geo. 3, c. 99, and 3 Geo. 4, c. 88, as to the bond by a tax collector and his surety, and the sale of lands and goods

Who are and are not accountants to the crown.

under it, *Gwynne v. Burnell*, 2 Bing. N. C. 7; 9 Bing. 544.) A recognizance by a guardian in the matter of a minor is not a debt due to the crown upon which an extent can issue, as the debt not being of a public nature, is not altered by the form of the security. (*Ex parte Usher*, 1 Rose, 366.) It is questionable whether a bond to the crown, entered into by the committee of a lunatic, in consequence of a grant of the lunatic's estate having been made to him in the usual form, under the great seal, be an obligation of the same force and effect as a statute staple within the 33 Hen. 8, c. 39, s. 50, so that an extent may be issued on it. (*Rex v. Lamb*, 1 C. Cl. 402; 13 Price, 649. See form of bond in Shelford on Lunatics, 633.) A deputy assistant commissary general was held to be a public accountant within the meaning of the statutes subjecting the property of certain accountants with the crown to seizure and sale for satisfaction of the balance against them. (*Rex v. Fernandez*, 12 Price, 862.) An agent of a fire insurance company, who has received premiums and duties for the company to whom he has given security, is liable to a writ of immediate extent for the duties, although the company be also liable to the crown. (*Rex v. Wrangham*, 1 C. & J. 408; 1 Tyr. 383.) A person employed in the service of the crown as deputy commissary general to the forces abroad, and assistant commissary in the islands of Guernsey and Alderney, and employed in the negotiation of Bank of England notes received from the paymaster-general of the forces, and of bills of exchange received from the treasury on account of the public service, having also received specie on the same account, is accountable to the crown, and is, as such accountant, within the stat. 13 Eliz. c. 4, s. 1, and his lands of which he was seised at any time during the period of his accountability are bound by his engagement with the public, and subjected to prerogative process for security and payment of the balance ultimately declared against him. (*Rex v. Rawlings*, 12 Price, 834.)

When lien of crown attaches;

In cases coming within the stat. 13 Eliz. c. 4, the lien of the crown attaches from the time at which the owner of the land becomes a receiver and accountant; so that a sale made after the acceptance of the office, and before any debt is contracted, may, to the extent of the interest of the crown, be defeated by the existence of a subsequent debt to the crown. (*Nicholls v. How*, 2 Vern. 389; *King v. Bishop of Sarum*, Moore, 126; 25 Geo. 3, c. 35.) All freehold lands are liable to the execution of the crown, and trust estates, (*Earl of Devonshire's case*, 11 Rep. 92; 13 Eliz. c. 4, s. 5,) as well as legal estates, are bound by this lien. Consequently the plea of being a purchaser for valuable consideration, without notice, will not avail against the crown; and a purchaser, though thus favourably circumstanced, cannot use an attendant term as a protection against the crown. (*Rex v. Smith*, 2 Sugd. V. & P. 411; 3 Id. app. p. 36; *How v. Nichol*, Pr.

b. 125. See *Rex v. St. John*, 2 Price, 317; *Rex v. Hollier*, Price, 394.) Where the term never was held in trust for the crown debtor, it may be used as a defence against the crown debt. (*Rex v. Lamb*, 13 Price, 649; M'Cl. 402.) Intailed lands are chargeable under 33 Hen. 8, c. 39, s. 76, when the lien attached on the *heir in tail*, as such, under the statute, a *bonâ fide* alienation by the heir in tail before the date of the writ of extent would bind the crown. (*Anderman's case*, 7 Rep. 21.) An agreement on borrowing (by recital in a bond) money, on the part of the borrower, that certain real property, freehold and leasehold, should stand pledged for repayment of it, and a delivery of the title deeds, amounting in equity to a mortgage or right to a mortgage, creates a lien binding as against the prerogative lien of the crown, in respect of a debt accruing due to the king subsequently: and the equitable mortgagees are entitled to be first paid their principal and interest out of the produce of the sale of the premises, the property of the crown debtor, seized under an extent in chief. (*Fector v. Philpot*, 12 Price, 197.) Where part of the property so equitably pledged was leasehold, renewable by the lessee, and the equitable mortgagee had procured a renewal of the lease in the name of the lessee, (the crown debtor), by surrendering the original lease, and taking a new one of the same premises after the crown debt had accrued, such new lease, and the premises leased thereby, were held to be subject to the equitable lien on the old lease, and the lien to be preferable to the demand on the part of the crown against the crown debtor, in respect of priority of satisfaction out of the proceeds of the sale. (Id.) When the mortgagor had become bankrupt, an equitable mortgagee was not allowed the costs of successfully defending an extent in aid. (*Ex parte Stephens*, 2 Mont. & Ay. 31.)

The crown is not entitled to recover against its debtors under an extent property which had been fairly and *bonâ fide* assigned to other creditors prior to the time when the debt to the crown was incurred. A. and B. carried on business in partnership; they were also members of a firm, which traded as C. & Co.: A. and B. for the purposes of paying off certain of their debts, assigned in trust to the other members of the firm of C. & Co. portions of their shares in that firm. The assignment, which was *bonâ fide*, was regularly intimated, and it was duly entered in the books of the firm. An extent at the suit of the crown afterwards issued against A. and B., it was held, that the portions of the shares thus assigned could not be seized under the extent. (*Spears v. The Lord Advocate*, 6 Cl. & Fin. 180, 189. See *Scott v. Scholey*, 8 East, 467; *Rex v. Sanderson*, 1 Wight. 51; *Rex v. Les*, 6 Price, 389.)

It was held no objection to the title to an estate, that an extent had issued from the crown against the owner, which

remained in the hands unexecuted, it appearing that the Lords of the Treasury had in fact compromised the debt, though a writ of *amoveas manus* had not actually issued. (*Peole v. Shergold*, 1 Cox, 160.) But it was held a sufficient objection to a title, that a person under whom the vendors claimed held during his seisin of the estate an office under the crown, and that his accounts with the crown had not been liquidated. (*Wilde v. Fort*, 4 Taunt. 334; *ante*, p. 551.)

The stat. 6 & 7 Will. 4, c. 28, (amended by 2 Vict. c. 61) enables persons to deposit stock or Exchequer bills, in lieu of giving security by bond to the postmaster-general, and commissioners of land revenue, customs, excise, stamps and taxes.

On the subject of crown debts, see West on the Law and Practice of Exchanges in Chief and in Aid, 8vo. 1817; Manning's Practice of the Court of Exchequer, 8vo. 1827; 5 Jarm. Convey. by Sweet, pp. 64 f, 79; and a succinct view of the prerogative remedies of the crown for the recovery of debts, Butl. Co. Litt. 209 a, 18th ed.

Searches for
crown debts.

This provision as to crown debts being only prospective, it must be ascertained whether there are any crown debts created or secured before the 4th June, 1839, when the act passed. Before the above act there was no easy and certain mode of guarding against the risk of crown debts, on account of there being no index to debtors and accountants to the crown. The usual searches for crown liabilities were made at the Exchequer Office, and amongst the receivers-generals' bonds at the Tax Office. (2 Real Prop. Rep. 12.) Searches for bonds entered into either as committees of the estates of lunatics, or as sureties for such committees, may be made at the office of the Clerk of the Custodies, if such bonds render the parties liable as accountants to the crown. (See *Rex v. Lamb*, M'Clell. 402; 13 Price, 649; *ante*, p. 552.)

As the estates of persons who are indebted to the crown remain liable during the existence of any part of the debt, it is necessary in all cases of sale or mortgage to ascertain whether the present or former owners have become accountants to the crown either on their own account or as sureties for others. Independently of the register to be established under the above act, the fact could never be ascertained with certainty, because there was no place in which the existence or the amount of debts due to the crown can be discovered; but it was proper to inquire of the vendor's solicitor and the connexions of the parties as to the existence of any such debts, and to make inquiries at any of the public offices with which the owner probably had any dealings. As to searches for judgments, see *ante*, pp. 547, 548.

REGISTRY OF A QUIETUS.

IX. That whenever a quietus shall be obtained by a debtor or accountant to the crown, and an office copy thereof shall be left with the senior master of the said Court of Common Pleas, together with a certificate, signed by the accountant-general, that the same may be registered, the said master shall forthwith enter the same in the said book of debtors and accountants to the crown, in alphabetical order, by the name of the person whose estate is intended to be discharged by such quietus, with the date, and shall for any such entry be entitled to a fee of two shillings and sixpence. (x)

Quietus to debtors or accountants to the crown to be registered.

(x) Formerly where a vendor was a debtor or accountant to the crown, the title was not good until a *quietus* was entered up on record. (See *Wilde v. Fort*, 4 Taunt. 334, ante, p. 554.) And a purchaser could not be compelled to take the title, although the crown consented to the payment of the purchase money into the Exchequer on account of the debt. (*Brakespear v. Innes*, 3 Sugd. V. & P. 409, 10th ed.)

DISCHARGE OF CROWN DEBTOR'S ESTATE.

X. And whereas it is expedient to make further provision for the discharge of an estate belonging to a debtor or accountant to the crown from the claim of the crown in the hands of a purchaser or mortgagee, although the debt or liability shall not be fully discharged; be it therefore enacted, that it shall be lawful for the commissioners of her majesty's treasury of the united kingdom of Great Britain and Ireland for the time being, or any three of them, by writing under their hands, upon payment of such sums of money as they may think fit to require into the receipt of her majesty's exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the crown, or upon such other terms as they may think proper, to certify that any lands, tenements, or hereditaments of any such crown debtor or

For discharge of the estates of debtors or accountants to the crown in certain cases.

accountant shall be held by the purchaser or mortgagee or intended purchaser or mortgagee thereof, his or their heirs, executors, administrators, and assigns, wholly exonerated and discharged from all further claims of her majesty, her heirs or successors, for or in respect of any debt, claim, or liability, present or future, of the debtor or accountant to whom such lands, tenements, or hereditaments belonged, or, in cases of leases for fines, to certify that the lessees, their heirs, executors, administrators, and assigns, shall hold so exonerated and discharged, without prejudice to the rights and remedies of the crown against the reversion of the lands, tenements, or hereditaments comprised in any such leases, and the rents and covenants reserved and contained by and in the same; and thereupon the same lands, tenements, or hereditaments shall respectively be held accordingly wholly exonerated and discharged as aforesaid, but in the cases of leases without prejudice as aforesaid.

PART DISCHARGE.

Discharge of part of the estate of a debtor or creditor to the crown not to affect claim of the crown on other lands liable.

XI. That any such certificate, or the discharge of any such lands, tenements, or other hereditaments by virtue of this act, shall in nowise impeach, lessen, or affect the right or power of her majesty, her heirs or successors, to levy the whole of any debt or demand which may at any time be due from any such debtor or accountant to the crown out of or from any other lands, tenements, or hereditaments which would have been liable thereto in case no such certificate had been granted and no such discharge had been obtained. (y)

(y) By 1 & 2 Geo. 4, c. 121, s. 10, where an estate is sold under a writ of extent, or by the Court of Chancery or Exchequer, and the purchase money is paid into the receipt of the king's exchequer, that will absolve the purchaser.

PURCHASE FROM BANKRUPT WITHOUT NOTICE.

XII. And whereas it is expedient that further provision should be made for the protection of purchasers against secret acts of bankruptcy and fiats in bankruptcy; be it therefore enacted, that all conveyances by any bankrupt *bond fide* made and executed before the date and issuing of the fiat against such bankrupt shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons to whom such bankrupt so conveyed had not at the time of such conveyance notice of any prior act of bankruptcy by him committed.

For protection of purchasers against secret acts of bankruptcy.

PURCHASE FROM BANKRUPT WITH NOTICE.

XIII. That no purchase from any bankrupt *bond fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy.

Purchases from bankrupts not to be impeached unless commission is sued out within twelve months.

IRELAND.

XIV. That this act shall not extend to Ireland.

Act not to extend to Ireland.

2 & 3 VICTORIA, c. 29.

An Act for the better Protection of Parties dealing with Persons liable to the Bankrupt Laws.

[19th July, 1839.]

DEALINGS AND PROCEEDINGS BY, WITH, OR AGAINST
BANKRUPTS, WITHOUT NOTICE.

WHEREAS by an act passed in the sixth year of the reign of his late majesty King George the Fourth, intituled "An Act to amend the Laws 6 Geo. 4, c. 16.

relating to Bankrupts," it was among other things enacted, that all payments really and *bond fide* made by any bankrupt or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), should be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, and that all payments really and *bond fide* made to any bankrupt before the date and issuing of the commission against such bankrupt should be deemed valid, notwithstanding any prior act of bankruptcy committed, and that such creditor should not be liable to refund the same to the assignees of such bankrupt provided the person so dealing with the bankrupt had not at the time of such payment to such bankrupt notice of any bankruptcy committed: And whereas by an act passed in this present session of parliament, intituled "An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fiats in Bankruptcy," it is amongst other things enacted, that all conveyances by any bankrupt *bond fide* made and executed before the date and issuing of the fiat against such bankrupt shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons to whom such bankrupt so conveyed had not at the time of such conveyance notice of any prior act of bankruptcy by him committed: And whereas it is expedient that further protection should be given to persons dealing with bankrupts before the issuing of any fiat against them: be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all contracts, dealings, and transactions by and with any bankrupt really and *bond fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments

2 Vict. c. 11.

All contracts, &c. *bond fide* made by and with any bankrupt previous to the date and

against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also, that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference.

issuing of any fiat to be valid, &c. if no notice had of prior bankruptcy.

II. That this act may be repealed or altered by any other act in this present session of parliament.

Act may be repealed.

3 & 4 VICTORIA, c. 82.

An Act for further amending the Act for abolishing Arrest on Mesne Process in Civil Actions.

[7th August, 1840.]

DEFINITION AND EXTENSION OF PROPERTY LIABLE
TO JUDGMENTS.

RECITES the act 1 & 2 Vict. c. 110, s. 14, (*ante*, p. 532) and that doubts had been entertained whether the said provisions extend to the cases hereinafter mentioned: and declares and enacts, That the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent as well in any such stocks, funds, annuities, or shares as aforesaid as also in the dividends, in-

1 & 2 Vict. c. 110.

Provisions of recited act as to property of judgment debtors defined and extended.

terest, or annual produce of any such stocks, funds, annuities, or shares : and whenever any such judgment debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion in, to, or out of any such stocks, funds, annuities, or shares as aforesaid, which now are or shall hereafter be standing in the name of the accountant general of the Court of Chancery or the accountant general of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor : provided always, that no order of any judge as to any stock, funds, annuities, or shares standing in the name of the accountant general of the Court of Chancery or the accountant general of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the governor and company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order.

REAL ESTATE NOT TO BE AFFECTED BY JUDGMENT
UNTIL MEMORANDUM LEFT.

No judgment,
decree, &c.
to affect real
estate, until
memorandum
left with the

II. And whereas it was by the said act further enacted, that no judgment of any of the superior courts of common law at Westminster, nor any decree or order in any court of equity, nor any

le of a court of common law, nor any order in
 nkruptcy or lunacy, should by virtue of the
 id act affect any lands, tenements, or heredita-
 ents, as to purchasers, mortgagees, or creditors,
 less and until such a memorandum or minute as
 erein mentioned should be left with the senior
 aster of the Court of Common Pleas at Westmin-
 ster: (x) And whereas doubts have been entertained
 hether a purchaser, mortgagee, or creditor,
 aving notice of any such judgment, decree, order,
 r rule as aforesaid, would not in equity be af-
 fected thereby, notwithstanding such a memoran-
 dum or minute of the same as in the said act is
 mentioned may not have been left with the senior
 master of the said Court of Common Pleas; be it
 therefore further declared and enacted, That no
 such judgment, decree, order, or rule as aforesaid
 shall by virtue of the said act affect any lands,
 tenements, or hereditaments at law or in equity as
 to purchasers, mortgagees, or creditors, unless and
 until such a memorandum or minute as in the said
 act in that behalf mentioned shall have been left
 with the senior master of the said Court of Com-
 mon Pleas at Westminster; any notice of any
 such judgment, decree, order, or rule to any such
 purchaser, mortgagee, or creditor in anywise not-
 withstanding.

senior mas-
 ter of the
 Common
 Pleas, not-
 withstanding
 notice of such
 decree, &c.
 to purchaser,
 &c.

(x) See *ante*, pp. 539, 540.

LEASE AND RELEASE.

4 & 5 VICTORIA, c. 21.

*An Act for rendering a Release as effectual for the
Conveyance of Freehold Estates as a Lease and
Release by the same Parties.*

[18th May, 1841.]

A release to
be effectual
although no
lease for a
year shall be
executed.

Release
chargeable
with the
stamp duty
to which the
lease for a
year would
have been
liable.

WHEREAS it is expedient to lessen the expense of conveying freehold estates: be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that every deed or instrument of release of a freehold estate, or deed or instrument purporting or intended to be a deed or instrument of release of a freehold estate, which shall be executed on or after the fifteenth day of May one thousand eight hundred and forty-one, and shall be expressed to be made in pursuance of this act, shall be as effectual for the purposes therein expressed, and shall take effect as a conveyance to uses or otherwise, and shall operate in all respects both at law and equity as if the releasing party or parties who shall have executed the same had also executed in due form a deed or instrument of bargain and sale or lease for a year for giving effect to such release, although no such deed or instrument of bargain and sale or lease for a year shall be executed; (a) provided that every such deed or instrument so taking effect under this act shall be chargeable with the same amount of stamp duty as any bargain and sale or lease for a year would have been chargeable with (except progressive duty) if executed to give effect to such deed or instrument, in addition to the stamp duties which such deed

instrument shall be chargeable with as a release otherwise under any act or acts relating to stamp duties. (b)

(a) Although it is almost superfluous to remark that the difference by lease and release is that in most general use, it may be proper to remind the student that the principles on which it is founded should be studied and examined. 2 Sanders on Uses, ch. Lease and Release; 2 Preston's v.g. 207—489; Shepp. Touch. 320; Sugd. Intr. to Gilson Uses; Butl. Co. Litt. 271, b. n. Div. iii. 3; Watk. on v.g. by Coventry and Preston; 3 Jarm. Conv. tit. Bargain and Sale.)

A conveyance in the old form by lease and release may be used, and as the parties taking a release under the new are charged with stamp duty, some expense may be saved in some cases by having a lease for a year, and by referring the release to the description of the parcels in the lease for year upon which the release may be indorsed. Care must be taken to make the reference correctly. It should be stated in the attestation clause of the lease for a year, that it was indorsed before the indenture of release thereupon indorsed. It is objectionable, when the lease and release are by separate deeds, to take a release with reference to the description of the parcels in the lease for a year, because in the event of the lease for a year being lost, there may be no evidence of what parcels were intended to pass by the release; hence the utility of the practice of describing the parcels both in the lease and release.

(b) By 55 Geo. 3, c. 184, Schedule, Part I. the following Stamp duties are imposed in respect of the lease for a year.

Bargain and sale (or lease) for a year, for vesting the possession of lands or other hereditaments in England, and enabling the bargainee to take a release of the freehold or inheritance, upon the sale or mortgage thereof:

	£	s.	d.	Stamp on lease for year.
Where the purchase or consideration money expressed in the release shall not amount to 20 <i>l.</i>	0	10	0	1 <i>l.</i> 10 <i>s.</i> 10 <i>d.</i>
And where the same shall amount to 20 <i>l.</i> and not amount to 50 <i>l.</i>	0	15	0	C 07
And where the same shall amount to 50 <i>l.</i> and not amount to 150 <i>l.</i>	1	0	0	
And where the same shall amount to 150 <i>l.</i> or upwards	1	15	0	
<i>Bargain and sale</i> (or lease) for a year, upon any other occasion	1	15	0	

II. And whereas many deeds or instruments of bargain and sale or leases for a year, to give effect The recital or mention of a lease for a

year in a release executed before the passing of this act, to be evidence of the execution of such lease for a year.

to deeds or instruments of release of freehold estates heretofore executed, have been lost or mislaid; be it enacted, that where, in or by any deed or instrument of release of freehold estates executed before the fifteenth day of May one thousand eight hundred and forty-one, any deed or instrument of bargain and sale or lease for a year for giving effect to such deed or instrument of release shall be recited, or by any mention thereof in such deed or instrument of release appear to have been made or executed, such recital or mention thereof shall be deemed and taken to be conclusive evidence of the deed or instrument of bargain and sale or lease for a year so recited or mentioned having been made and executed; and such deed or instrument of release shall also have the like effect as if the same had been executed after the fifteenth day of May one thousand eight hundred and forty-one, whether such deed or instrument of bargain and sale or lease for a year shall or shall not have been lost or mislaid, or may or may not be produced: provided always, that this act shall not prejudice or affect any proceedings at law or in equity pending at the time of the passing of this act, in which the validity of any bargain and sale or lease for a year shall be in question between the party claiming under such bargain and sale or lease for a year and the party claiming adversely thereto; and such bargain and sale or lease for a year, if the result of such proceedings shall invalidate the same, shall not be rendered valid by this act. (c)

Recital of lease for year sufficient as to lands in Ireland.

(c) In Ireland the actual existence of a lease for a year is not required, it is sufficient if the release contains the usual reference to it. By the Irish stat. 9 Geo. 2, c. 5, s. 6, made perpetual by 1 Geo. 3, c. 3, after reciting that it has frequently happened that purchasers for valuable considerations under deeds of lease and release have been prevented from recovering their rights for want of being able to produce the lease for a year, which is often lost or mislaid, it is enacted, "that in all cases the recital of a lease for a year in the deed of release shall be deemed and be taken to be full and sufficient evidence of such lease." This statute makes no alteration in the law,

and only facilitates the proof of the lease for a year, by making the recital of it equal to the production, but it must be recited to be such as it ought to be if produced. The words "in his the releasee's) actual possession now being, by virtue of a lease made pursuant to the statute," were held an insufficient recital of the lease within this statute. The lands however being in lease, the release was held to operate as a grant of the reversion, from the words "demise, set, and to farm let," notwithstanding there was a covenant in the instrument to make a future grant. (*Doe d. Burne v. Saunders*, 1 Fox & Smith, 18. See 1 T. R. 735; 12 East, 186; 15 East, 244; 5 T. R. 163.) By the Irish stat. 1 Geo. 3, c. 3, it is declared that in all cases of pleading deeds of lease and release, wherein it may be necessary to allege the bringing such deeds into court, it shall be sufficient to allege the bringing into court the deed of release, in which the recital of such lease shall to all purposes whatsoever be as effectual as producing the same. (See *Bolton v. Bishop of Carlisle*, 2 H. Bl. 262; *Jenkins v. Peace*, 4 Jur. 850.

III. And be it enacted, that in the construction of this act the word "freehold" shall have not only its usual signification, but shall extend to all lands and hereditaments for the conveyance of which, if this act had not been passed, a bargain and sale or lease for a year, as well as a release, would have been used.

Construction
of the word
"freehold."

IV. And be it enacted, that this act may be amended or repealed by any act to be passed during the present session of parliament.

Act may be
altered, &c.



APPENDIX.

No. I.

RELEASE AND CONVEYANCE of the freehold part, and covenant to surrender the copyhold part, of an estate, by a tenant in tail in possession, to a purchaser with limitations, or a declaration to bar dower; the vendor's wife joining to extinguish her right of dower. (See 3 & 4 Will. 4, c. 74, ss. 15, 40, 53; ante, p. 298, 329, 341, and 3 & 4 Will. 4, c. 105, ss. 6, 14, ante, p. 418, 422.

THIS INDENTURE, made the — day of —, Parties. in the year of our Lord —, between B. Adams, of &c., Esq., (eldest son and heir of the body of A. Adams, late of, &c., Esq., deceased, by Anne, his late wife, before A. Bell, spinster, also deceased,) and Mary his wife, of the first part; [the purchaser] of the second part, and J. K., of, &c., gent. (a trustee nominated by and on behalf of the said [purchaser]) of the third part. [If the purchaser should not have been married until after the 1st of Jan. 1834, and the declaration should be adopted, (see post,) there will be no necessity for a trustee.] (a)

(a) A husband married on or before the 1st of January, 1834, will not be able to defeat his wife's right of dower, by the new methods prescribed by the act for amending the law of dower. It will therefore be advisable for a purchaser who married before that time to have the estate conveyed to such uses as will enable him to defeat his wife's dower, without her future concurrence. The old form used for that purpose will enable

Recital of
settlement
creating the
entail.

WHEREAS by indentures of lease and release, bearing date respectively the 8th and 9th days of March, 1800, the release being made, or expressed to be made, between the said A. Adams, of the first part, the said Anne Adams, then A. Bell, spinster, of the second part, A. B. and C. D. of the third part, and E. F. and G. H. of the fourth part, (being the settlement made previously to and in consideration of the marriage then intended to be, and shortly afterwards duly had and solemnized between the said A. Adams and A. Bell,) the freehold parts of the capital messuage or tenement, farm, lands, and hereditaments hereinafter described and intended to be hereby granted and released, were (amongst other hereditaments) duly conveyed and assured from and after the solemnization of the said intended marriage, to the use of the said A. Adams and his assigns, for and during the term of his natural life, and from and after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of the said A. B. and C. D. and their heirs, during the natural life of the said A. Adams, upon trust to support the contingent uses and estates thereinafter limited, and from and after the decease of the said A. Adams, To the use, intent, and purpose, that the said A. Bell, in case she survived the said A. Adams, should receive and take the annual sum or yearly rent charge of 300*l.* for her jointure and in bar of her dower, with the usual powers and remedies by distress and entry for recovering and enforcing the payment thereof, and, subject thereto, to the use of the said E. F. and G. H., their executors, administrators, and assigns, for the term of 200 years, upon certain trusts for further securing the payment of the said annual sum or yearly rent charge, and from and after the expiration or other sooner determination of the said term of 200 years, and in the meantime subject thereto, to the use of the first and every other son of the said A. Adams, on the body of the said A. Bell lawfully to be begotten, severally

the purchaser to destroy the right of dower as effectually as heretofore, by an execution of the power of appointment; but unless it be assumed that a widow, married before the 1st of January, 1834, cannot avail herself of the second section of the act, (*ante*, p. 422,) the limitation to the trustee during the life of the purchaser will be useless. Both Sir Edward Sugden, (2*V.* & P. 222, 10th ed.) and Mr. Hayes, (1 *Conv.* 304, 5th ed.) agree in the propriety of adopting the old form of uses to prevent dower in the case of a husband married on or before the 1st of January, 1834.

and successively, according to their respective seniorities, and the heirs of the body and respective bodies of all and every such sons and son issuing, with divers remainders over: AND WHEREAS at a court held in and for the manor of Dale, in the said county of —, on the — day of —, the said A. Adams, in pursuance of a covenant for that purpose contained in the said recited indenture of settlement, did surrender all and every the messuages, lands, tenements, and hereditaments of him the said A. Adams, holden of the said manor by copy of court roll, with their appurtenances, to the use of the said A. B. and C. D., their heirs and assigns, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisos, agreements, and declarations as (regard being had to the nature of the said estates, and the tenure by which the same were holden) would nearest or best correspond with the uses, estates, trusts, powers, provisos, agreements, and declarations expressed and contained in the said hereinbefore recited indenture of the 9th of March, 1800, of and concerning the freehold hereditaments thereby released, or expressed and intended so to be, or such and so many of the same uses, estates, trusts, powers, provisos, and declarations as were then subsisting undetermined and capable of taking effect: And at the same court the said A. B. and C. D. were duly admitted tenants to the said copyhold hereditaments so surrendered to their use as aforesaid, To HOLD to the said A. B. and C. D. and their heirs, according to the form and effect of the surrender so made to their use as aforesaid, at the will of the lord of the said manor of Dale, by copy of court roll, by the rents and services therefore due and of right accustomed to be paid and performed: AND WHEREAS the said A. Adams departed this life on or about the 1st day of May, 1830, leaving the said B. Adams, his eldest son and heir at law, who thereupon became entitled to the hereditaments comprised in the said recited indentures for an estate of inheritance in tail general, subject to the said annuity or yearly rent charge of 300*l.*, and the powers, remedies, and term for securing the payment of the same: AND WHEREAS the said Anne Adams departed this life on or about the first day of October now last past, and all arrears of the said annuity or yearly rent charge of 300*l.* having been paid up to the time of her decease, the term of 200 years, created by the said recited indenture of settlement has, by force of a proviso therein contained, absolutely ceased and determined: AND WHEREAS the said B. Adams has

Surrender of copyholds to trustees upon the trusts of the settlement.

Death of tenant for life.

Death of jointress.

Contract to purchase.

Apportionment of consideration.

Death of one of the trustees.

First Testatum.
Conveyance of freeholds.

contracted and agreed with the said [purchaser] for the absolute sale to him of the fee simple and inheritance of and in the freehold parts of the messuage or tenement, farm, lands, and hereditaments hereinafter described, and of the customary estate of inheritance of and in the copyhold parts of the same hereditaments, free from all incumbrances, at or for the price or sum of 5000*l.*: AND over the treaty for the said purchase it was agreed that the sum of 4100*l.* (part of the said sum of 5000*l.*) should be the apportioned value of the said freehold hereditaments and that the sum of 900*l.* (residue of the said sum of 5000*l.*) should be the apportioned value of the said copyhold hereditaments: AND WHEREAS the said A. B. departed this life on or about the 5th day of May, 1833 leaving the said C. D., his co-trustee, him surviving, and in whom the legal estate in the said copyhold hereditaments is now vested: NOW THIS INDENTURE WITNESSETH, that in pursuance and part performance of the said recited agreement, and for defeating all estates tail of the said B. Adams of and in the messuage, farm, lands, and hereditaments hereby granted and released, or expressed and intended so to be, and all remainders, reversions, estates, rights, interests, and powers, to take effect after the determination or in defeasance of such estates tail (b), and for extinguishing the dower, right and title of dower, and every other estate and interest of the said Mary Adams of and in the same hereditaments, and for limiting and assuring the same hereditaments and the inheritance thereof in fee simple to the uses hereinafter expressed, and for and in consideration of the sum of 4100*l.* of lawful money of Great Britain (part of the said sum of 5000*l.*, the aforesaid purchase-money,) to the said B. Adams in hand well and truly paid by the said [purchaser] at or immediately before the sealing and delivery of these presents, the receipt of which said sum of 4100*l.* in full for the absolute purchase of the freehold parts of the hereditaments hereinafter described, and intended to be hereby granted and re-

(b) The intention to bar entails was formerly thus expressed in recovery deeds, and in deeds of covenant to levy fines:—"For docking, barring, and extinguishing all estates tail, and reversions and remainders thereupon expectant or depending of and in the messuages," &c. The language in the precedent is more conformable to that of the general enabling clause in the 3 & 4 Will. 4, c. 74, s. 15, (*ante*, p. 298,) although it is conceived that the old mode of expressing the intention would be equally effectual.

ceased, and the fee simple and inheritance thereof, free from all incumbrances, the said B. Adams doth hereby admit and acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, and every of them for ever by these presents: He the said B. Adams, under and by virtue and in pursuance of the powers and provisions given by and contained in an act of parliament made and passed in the session of parliament held in the 3d and 4th years of the reign of his late majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," (c) hath granted, aliened, disposed of, released, and confirmed, and by these presents [if a lease for a year is used, omit the following words in italics, and insert the words in italics in the next page—"*made in pursuance of the act passed in the session of parliament held in the 4th and 5th years of the reign of her majesty Queen Victoria, intituled 'An Act for rendering a Release as effectual for the Conveyance of freehold Estates as a Lease and Release by the same Parties,'*" (d)] doth grant, dispose of, alien, release, and confirm, and the said Mary Adams, with the concurrence of the said B. Adams, and for the purpose of releasing and extinguishing her right and title of dower in or out of the said messuages, lands, and hereditaments hereinafter described, and hereby granted and released, or expressed and intended so to be, hath remised, released, and quitted claim, and by these presents intended to be forthwith duly acknowledged by the said M. Adams, and perfected in other respects with the solemnities prescribed by law for rendering deeds of married women effectual to extinguish their interests in land, doth remise, release, and quit claim unto the said [*purchaser*]. [If a lease for a year is used, here insert the following words in italics—

(c) Although it may not be necessary to refer to the act of parliament, enabling a tenant in tail to dispose of his interest and to bar the remainders, yet as such reference will remove all doubt as to the intention of the party, it has been thought advisable to do so. It is well known, that previously to and independently of that statute, a lease and release, grant, bargain and sale, although inrolled, by a tenant in tail, passed only a base fee determinable by the issue in tail; and if the act of parliament be not referred to, nor the intention to bar the entail stated on the face of the instrument, a question will arise whether it will take effect at common law or operate under the act.

(d) See *ante*, p. 562.

General
words.

Reversion,
&c.

All deeds.

"in his actual possession now being by virtue of a bargain and sale to him thereof made by the said B. Adams, in consideration of 5s., by an indenture bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession" and his heirs, [All such part or parts and so much as is or are freehold, and not copyhold, and in] (e). All [parcels], together with all and singular houses, outhouses, edifices, buildings, barns, stables, coach-houses, cottages, yards, gardens, orchards, backsides, toll-lands, meadows, pastures, commons, common of pasture, common of turbary, mines, minerals, quarries, fens, trees, woods, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, water-courses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the said messuage, farm, lands, hereditaments, and premises belonging or in anywise appertaining, or with the same or any of them respectively now or at any time heretofore demised, leased, held, used, occupied or enjoyed, or accepted, reputed, deemed, taken or known as part, parcel or member of them, or any part of them, or appertaining thereunto, with their and every of their appurtenances. And the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of all and singular the messuage, farm, lands, and other hereditaments hereinbefore granted and released, or expressed and intended so to be: And all the estate, right, title, interest, inheritance, use, trust, possession, property, possibility, claim and demand whatsoever, both at law and in equity, of them the said B. Adams and Mary his wife, and each of them, of, in, to, from and out of the same premises, and every part and parcel thereof: [And all deeds, evidences and writings relating to or concerning the said messuage, farm, lands, hereditaments and premises, or any of them, solely or together with other hereditaments of less value, now in the custody or power of the said B. Adams, or which he can obtain or procure without suit at law or in equity, together with true and attested copies of all deeds, evidences and writings relating to or concerning the same hereditaments and pre-

(e) Where the freeholds can be clearly identified, the words within brackets should be omitted.

ses, or any of them, jointly with other hereditaments equal or greater value; the first set of such copies to be made and delivered at the costs and charges of the id B. Adams, but all future copies to be made, written id taken at the request, costs and charges of the said purchaser.] (f').] To HAVE AND TO HOLD the said message or tenement, farm and lands, and all and singular her the hereditaments and premises hereby granted and leased, or expressed and intended so to be, unto the id [purchaser] and his heirs. [If the purchaser should have been married on or before the 1st of January, 1834,

Habendum.

(f') This clause should be omitted where the title-deeds were not intended to be delivered to the purchaser. It is an established principle that whoever is entitled to the land has also a right to the title-deeds. (*Harrington v. Price*, 3 B. & A. 170; *Hooper v. Ramsbottom*, 6 Taunt. 12; *Ogle v. Story*, B. & Ad. 735; *May v. Harvey*, 13 East, 197; *Parry v. Francis*, Bos. & P. 451; *Lord v. Wardle*, 3 Bing. N.C. 680.) Where the vendor sells only part of the estate, and retains the remainder, to which the deeds relate, the purchaser is not entitled to them without an express grant (*Yea v. Field*, 2 T. R. 708; 2 West. Conv. 466); and where lands held under one title are sold to two or more persons in separate parcels, the deeds are usually granted to the purchaser of the largest lot; but in cases where a purchaser cannot obtain the original deeds, he is entitled, in the absence of a stipulation to the contrary (*Boughton v. Jewell*, 17 Ves. 176), to attested copies of all such of them as are not of record. (*Campbell v. Campbell*, cited 1 Sugd. V. & P. 529.) Although, as observed by Lord Eldon in *Dare v. Tucker*, 6 Ves. 460, purchasers have set a value upon attested copies which does not belong to them, they are waste paper upon an ejectment, except between the parties themselves. Therefore a purchaser should obtain a covenant from the vendor or the person having the larger portion of the estate to produce the deeds themselves, in order that the purchaser may be enabled to defend his title and possession. (1 Sugd. V. & P. 531.) But where a purchaser of a small part of an estate took a covenant for the production of the deeds of which he afterwards obtained possession as mortgagee, it was held that the assignee of the mortgage could not recover them where the assignment of the mortgage contained no grant of the deeds. (*Yea v. Field*, 2 T. R. 708.) In *Barclay v. Raine*, 1 Sim. & Stu. 449, it was decided, that where the vendor had not the custody of the original deeds, but had a covenant for the production of them, that the title was not marketable, because the covenant did not run at law with the land. (See 2 Real Prop. Rep. p. 15—17, and 3 Real Prop. Rep. 56—58, 72, pl. 11.)

Old form of
limitation to
bar dower.

or if the time of his marriage is a matter of doubt, it will be advisable to adopt the old limitations to prevent dower; if after that time, the declaration subsequently inserted will be sufficient.] To THE USE of such person or persons, for such estate or estates, interest or interests, and to and for such uses, intents and purposes, and under and subject to such powers, provisoes, declarations, and agreements, and in such manner and form as he the said [purchaser] by any deed or deeds, instrument or instruments in writing to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, shall from time to time or at any time or times direct, limit or appoint, and in default of and until such direction, limitation or appointment, and as to such part or parts of the premises of which no complete direction, limitation or appointment shall be made, or to which any such direction, limitation or appointment shall not extend, to the use of the said [purchaser] and his assigns, during his natural life, without impeachment of waste, and from and after the determination of that estate by any means in his lifetime, to the use of the said [trustee] and his heirs, during the life of the said [purchaser]; In trust, nevertheless, for the said [purchaser] and his assigns, to the intent that no wife of the said [purchaser] who shall happen to survive him shall become entitled to dower out of or in the said premises or any part thereof, and from and after the determination of the estate so limited in use to the said [trustee] and his heirs, during the life of the said [purchaser], To the only use and behoof of the said [purchaser], his heirs and assigns for ever, and to, for, and upon no other use, trust, intent or purpose whatsoever. [Or where the declaration is adopted, "To THE USE and behoof of the said [purchaser], his heirs and assigns for ever: And it is hereby declared by the said [purchaser] that any wife of the said [purchaser], who shall happen to survive him, shall not be entitled to any dower out of or in the messuage, farm, lands, and hereditaments hereby granted and released, or expressed and intended so to be, or any part thereof."] AND the said B. Adams doth hereby for himself, his heirs, executors, and administrators, covenant, promise and agree, to and with the said [purchaser], his heirs and assigns, (g) that

Declaration
to bar dower.

Covenant by
vendor that
his wife shall
acknowledge
the deed be-
fore commis-
sioners.

(g) When it is probable that the separate examination and acknowledgment by a married woman will not be taken at the time of the execution of the deed by her, it seems advisable to insert a covenant of this kind in the deed, which she is required to acknowledge.

the said Mary Adams (she hereby consenting) shall and will forthwith, or as soon as conveniently may be after the execution of these presents, at the costs and charges of the said B. Adams, his heirs, executors, or administrators, duly appear before two of the perpetual commissioners appointed for the county of —, for taking the acknowledgments of deeds by married women, pursuant to the aforesaid act of parliament of the third and fourth years of the reign of King William the Fourth, (h) and that the

(h) *Short form.*—That she the said Mary Adams shall and will appear before the said commissioners, and do all such acts as are required by the said act of parliament, and the orders of the Court of Common Pleas made in pursuance thereof, for consenting to and acknowledging these presents, and the lease for a year upon which the same is grounded, in order that the necessary certificate of acknowledgment thereof may be duly signed and filed of record in her majesty's Court of Common Pleas at Westminster.

See No. 15, *post*, for a covenant of this kind, where the deed is to be acknowledged before a judge or master in chancery.

Covenant where two Married Women are to acknowledge the Deed.

And each of them the said [*husbands*], so far as concerns the acts, deeds, and defaults of his own wife respectively, but not further or otherwise, doth hereby for himself, his heirs, executors and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns, that each of them the said [*married women*] they hereby respectively consenting, shall and will forthwith, or as soon as conveniently may be after the execution of these presents, at the joint costs and charges of the said [*husbands*], their respective heirs, executors, or administrators, duly appear before two of the perpetual commissioners appointed for the city of — for taking the acknowledgments of deeds by married women, pursuant to the act in that case made and provided, and that each of them the said [*married women*] shall and will produce these presents, and the lease for a year upon which the same is grounded, and acknowledge the same respectively to be her act and deed before the said commissioners, and be respectively examined by them apart from her respective husband, touching her knowledge of the contents of these presents, and the lease for a year upon which the same is grounded, and freely and volun-

said Mary Adams shall and will produce these presents and the lease for a year upon which the same is grounded, and acknowledge the same respectively to be her act and deed before the said commissioners, and be examined by them apart from the said B. Adams her husband, touching her knowledge of the contents of these presents, and the lease for a year upon which the same is grounded, and freely and voluntarily consent thereto, and do all such other acts and things as are required by the said act of parliament, and the orders of the Court of Common Pleas made in pursuance thereof, for completing and giving effect to such separate examination of and acknowledgment by the said Mary Adams as aforesaid, and for causing the certificate of such acknowledgment, with an affidavit of the signature thereof by the said commissioners, to be duly filed of record in his majesty's Court of Common Pleas at Westminster:

Second Testatum.

Covenant to surrender copyholds.

AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance and further performance of the said recited agreement, and for and in consideration of the sum of 900*l.* of lawful money of Great Britain (residue of the said sum of 5000*l.* the purchase-money aforesaid,) to the said B. Adams well and truly paid by the said [*purchaser*] immediately before the execution of these presents, in full for the absolute purchase of the copyhold hereditaments hereinafter mentioned, and covenanted to be surrendered, and the customary inheritance thereof in possession, the receipt of which said sum of 900*l.* by the said B. Adams doth hereby acknowledge, and of and from the same and every part thereof doth hereby acquit, release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, and every of

tarly consent thereto, and that each of them the said [*married women*] shall and will do all such other acts and things as are required by the said act of parliament, and the orders of the Court of Common Pleas made in pursuance thereof, for completing and giving effect to such separate examinations and acknowledgments by the said [*married women*] respectively as aforesaid, and for causing the certificate or certificates of such acknowledgments respectively, with an affidavit or affidavits of the signature or signatures thereof respectively by the said commissioners, to be duly filed of record in her majesty's Court of Common Pleas at Westminster.

and, for ever: (i) He the said B. Adams doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said [*purchaser*], his heirs and assigns, that he the said B. Adams and C. D.

(i) Where the equitable entail in the copyholds is proposed to be barred by deed, the following form may be used, but the trustee must surrender the *legal* estate, and this deed be entered on the court-rolls.

And in order to defeat all estates tail of the said B. Adams of and in the lands and hereditaments hereby granted and released, or expressed and intended so to be, and all remainders, reversions, estates, interests, and powers to take effect after the determination or in defeasance of such estates tail, he the said B. Adams, under and by virtue, and in pursuance of the powers and provisions given by and contained in the said act of parliament of the third and fourth years of the reign of King William the Fourth, hath granted, disposed of, aliened, released, and confirmed, and by these presents so made in pursuance of the said act of parliament passed in the session of parliament held in the fourth and fifth years of the reign of her present majesty Queen Victoria, doth grant, dispose of, alien, release, and confirm unto the said [*purchaser*], his heirs and assigns, All such part or parts as is or are held by copy of court roll, of and in the messuage, farm, lands, hereditaments, and premises hereinbefore described, and every part and parcel thereof, and of and in their and every of their rights, members and appurtenances, and all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit and equity of redemption, claim and demand whatsoever, at law or in equity, or otherwise howsoever, of him the said B. Adams, of, in, to, out of or upon the said copyhold hereditaments and premises hereby granted and released, or expressed and intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, To have and to hold the said copyhold hereditaments, and all and singular other the copyhold premises hereby granted and released, or expressed or intended so to be, and every part and parcel of the same, with their and every of their rights, members and appurtenances, unto the said [*purchaser*], his heirs and assigns for ever, subject nevertheless to the rents, suits and services therefore due and of right accustomed to be paid, rendered and performed.

Covenants
for title by
vendor.

and all other persons rightfully claiming under or in trust for him the said B. Adams, or his heirs or assigns, shall and will, on the request and at the costs and charges of the said [*purchaser*], his heirs or assigns, at or before the next court baron or customary court to be holden in and for the said manor of Dale, or out of court, according to the custom of the same manor, well and effectually surrender or cause to be surrendered into the hands of the lord or lady of the said manor, according to the custom thereof, to the use of the said [*purchaser*], his heirs and assigns for ever, (k) All such and so many and such part or parts as is or are copyhold and holden of the said manor by copy of court roll, of and in the messuage or tenement, farm, lands and hereditaments hereinbefore described, with their and every of their rights, members and appurtenances, and all the estate, right, title, interest, trust, property, possession, claim and demand whatsoever, of them the said B. Adams and C. D., and each of them, of, in, and to the same and every part thereof, to the intent that the said [*purchaser*] or his heirs may be admitted tenant or tenants of the said copyhold hereditaments; To hold the same to him the said [*purchaser*], his heirs and assigns for ever, at the will of the lord or lady of the said manor, by copy of court roll, according to the custom of the same manor, by and under the rents, suits and services therefore due and of right accustomed to be paid and performed. And that in the mean time and until such surrender shall be made, and the said [*purchaser*] or his heirs shall be admitted tenant or tenants under and by virtue of the same surrender, be the said C. D. and his heirs and all other persons shall stand and be seised or possessed of the same copyhold lands and hereditaments, and every part of the same, with the appurtenances, upon trust, and for the sole benefit of the said [*purchaser*], his heirs and assigns. (l) And the said B. Adams, for himself, his heirs, executors and administrators, doth further covenant, promise and agree to and with the said [*purchaser*], his [appointees], (m) heirs and assigns, by these presents, in manner following, (that is to say), that notwithstanding any act, deed,

(k) Where the copyhold part of the estate is not included in the previous description of the parcels, the copyholds intended to be surrendered should be here described.

(l) See form of surrender, *post*, p. 589, 590.

(m) The word "appointees" should be omitted when no power of appointment is given to the purchaser.

utter or thing, by him the said B. Adams, or the said Adams, or either of them, made, done, committed or executed, or knowingly or willingly suffered to the contrary, be the said B. Adams, at the time of the sealing and delivery of these presents, is lawfully, rightfully and absolutely seized of and in, or well and sufficiently entitled to the said messuage and other hereditaments hereinbefore granted and released, or expressed and intended so to be, and every part thereof, with their appurtenances, for a good, sure, sole, perfect and absolute estate of inheritance in fee tail general in possession, and of the said customary copyhold lands, hereditaments and premises, hereinbefore covenanted to be surrendered, for an equitable state of inheritance in tail general, according to the custom of the manor of Dale aforesaid, without any manner of condition, use, trust, property, power of revocation, equity of redemption, remainder or limitation of any use or other restraint, cause, matter or thing whatsoever, to alter, change, defeat, incumber, revoke or make void the same, and that notwithstanding any such act, deed, matter or thing, as aforesaid, they the said B. Adams, and C. D., or one of them, now have or hath in themselves or himself good right, full power, and lawful and absolute authority to grant, release, dispose of, surrender, and confirm the said freehold and copyhold messuage, farm, lands, and other hereditaments, hereinbefore granted and released, and disposed of, or expressed and intended so to be, and hereinbefore covenanted to be surrendered, with the appurtenances thereunto belonging, unto the said [purchaser], his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: AND that it shall and may be lawful to and for the said [purchaser], his [appointees], heirs and assigns, from time to time and at all times hereafter peaceably and quietly to enter into and upon, and to have, hold, occupy, possess, and enjoy the said freehold and copyhold messuage, farm, lands and other hereditaments, hereinbefore granted, released, and disposed of, or expressed and intended so to be, and hereinbefore covenanted to be surrendered, with their appurtenances, and to have, receive, and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of or by them the said B. Adams and Mary his wife, and C. D., or any or either of them, their or any or either of their heirs or issue, or

For quiet enjoyment.

Free from incumbrances.

For further assurance.

of or by any other person or persons lawfully or equitably claiming or to claim, by, from, or under or in trust for them, or any or either of them, or by, from, or under the said A. Adams: AND that free and clear, and freely and clearly, and absolutely acquitted, exonerated, released and for ever discharged or otherwise by the said B. Adams, his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, jointures, dower, right and title of dower, uses, trusts, entails, wills, statutes, merchant or of the staple, recognizances, judgments, executions, rents, arrears of rent, annuities, legacies, sums of money, yearly payments, forfeitures, re-entries, cause and causes of forfeiture and re-entry, debts of record, debts due to the queen's majesty, and of, from, and against all other estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned or suffered, or hereafter to be had, made, executed, occasioned or suffered, by the said B. Adams or the said C. D. or either of them, their or either of their heirs or issue, or by any person or persons lawfully or equitably claiming or to claim, by, from, or under, or in trust for them, or any or either of them, or by the said A. Adams, or any person claiming under him: AND FURTHER, that the said B. Adams and Mary his wife, and his heirs and issue, and the said C. D. and his heirs, and all and every other persons and person having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, property, claim or demand whatsoever, either at law or in equity, of, to, in or out of the said messuage, farm, lands, and other hereditaments, hereinbefore granted, released, and disposed of, or expressed and intended so to be, and hereinbefore covenanted to be surrendered, or any of them, or any part thereof respectively, by, from, or under or in trust for the said B. Adams and his heirs or issue, or the said C. D. or his heirs, or any of them, or by, from, or under the said A. Adams, shall and will from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said [purchaser], his [appointees], heirs or assigns, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, conveyances, surrenders and assurances in the law whatsoever, for the further, better, more per-

fectly, and absolutely granting, releasing, conveying, surrendering, assuring, and confirming the said freehold and copyhold messuage, farm, lands, and other hereditaments hereinbefore granted, released, and disposed of, or expressed and intended so to be, and hereinbefore covenanted to be surrendered, and every part thereof, with their appurtenances, unto the said [*purchaser*], his [*appointees*], heirs and assigns, or otherwise as he or they shall direct or appoint, and as by the said [*purchaser*], his [*appointees*], heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required. IN WITNESS, &c.(n)

◆

*Memorandum to be indorsed on, or written at the foot,
or in the margin of the last Deed.*

This deed, marked B. [*or some other letter or mark*], was this day produced before us, and acknowledged by Mary Adams, therein named, to be her act and deed; previous to which acknowledgment the said Mary Adams was examined by us, separately and apart from B. Adams, her husband, touching her knowledge of the contents of the said deed, and her consent thereto, and declared the same to be freely and voluntarily executed by her. Witness our hands, this — day of January, 18—.

[Signatures of two Commissioners.]

◆

*Where acknowledgment relates to two or more married
Women.*

This deed, marked A. [*or some other letter or mark*], was this day produced before us, and acknowledged by [*Christian and surnames of married women*] therein named, to be their several acts and deeds; previous to which acknowledgments the said [*names as above*] were examined by us separately and apart from their respective husbands, touching their knowledge of the contents of the said deed,

(n) This deed, in order to be effectual, must be inrolled in Chancery within six calendar months after its execution. (See *ante*, p. 330.) It has been submitted that a vendor ought to procure the conveyance to be inrolled at his own expense, for the same reason that he was required to bear the expense of a fine or common recovery. 9 Jarm. Prec. 412, n.

and their consent thereto, and each of them declared the same to be freely and voluntarily executed by her. Dated the — day of — one thousand eight hundred and —.

[Signatures of two Commissioners.]

Certificate of two of the perpetual Commissioners, having taken the Acknowledgment of Mary Adams, to be written or engrossed on a separate piece of Parchment.

These are to certify that on the — day of January, 18—, before us, A. B., of &c. gentleman, and C. D. &c. gentleman, two of the perpetual commissioners appointed for the county of — for taking the acknowledgments of deeds by married women, pursuant to an act passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," appeared personally, Mary, do wife of B. Adams, of &c. esq., and produced a certain indenture of lease(o), marked A., bearing date the — day of January, 18—, and made between [insert the names and descriptions of the parties], and also a certain indenture of release, marked B., bearing date the — day of January, 18—, and made between [insert the names and descriptions of the parties], and acknowledged the same respectively to be her act and deed; and we do hereby certify that the said Mary Adams was, at the time of her acknowledging the said deeds [or deed], of full age and competent understanding, and that she was examined by us, apart from the said B. Adams, her husband, touching her knowledge of the contents of the said deeds [or deed], and that she freely and voluntarily consented to the same.

[Signatures of the two Commissioners.]

Certificate relating to three married Women.

These are to certify that on the — day of —, in the year one thousand eight hundred —, before us

(o) When a lease for a year is not used, omit the words in italics.

[*names and descriptions of two commissioners*], two of the perpetual commissioners appointed for the said county of — for taking the acknowledgments of deeds by married women, pursuant to an act passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," appeared personally Mary, the wife of John Jones, Ellen, the wife of Edward Ellis, and Anne, the wife of Arthur Arms, and produced a certain indenture of release, marked A., bearing date the — day of —, one thousand eight hundred and —, and made between the said John Jones and Mary his wife, Edward Ellis and Ellen his wife, and Arthur Arms and Anne his wife of the first part, the said John Jones of the second part, and Luke Lee of the third part, and acknowledged the same to be their respective acts and deeds. And we do hereby certify that the said Mary Jones, Ellen Ellis, and Anne Arms, were at the time of their respective acknowledging the said deed of full age and competent understanding, and that each of them was examined by us apart from her husband, touching her knowledge of the contents of the said deed, and that each of them freely and voluntarily consented to the same.

[*Signed by the two Commissioners.*]

FORMS OF AFFIDAVITS (p).

No. 1.

Affidavit verifying the Certificate of Acknowledgment, to be made by an Attorney, (not being a Commissioner for taking the Acknowledgment.)

IN THE COMMON PLEAS.

A. B. of —, in the — of —, gentleman, one of the attornies [*or, solicitors*], of the Court of —, maketh oath and saith, that he knows E. F., the wife of F. F., in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said E. F., and the certificate signed by G. H. of —, in the — of —, gentleman, and I. K. of —, in the — of —, gentleman, the commissioners

(p) See other forms of affidavits, *ante*, pp. 393, 395.

in the said certificate mentioned, on the day and year therein mentioned, at —, in the — of —, in the presence of this deponent, and that at the time of making such acknowledgment the said E. F. was of full age and competent understanding, and that the said E. F. knew the said acknowledgment was intended to pass her estate in the premises, respecting which such acknowledgment was made. And this deponent further saith, that to the best of this deponent's knowledge and belief, the said G. H. [*or, I. K.*] one of the said commissioners, is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor or agent, so interested or concerned. And this deponent further saith, that previous to the said E. F. making the said acknowledgment, he the said deponent inquired of her the said E. F. whether she intended to give up her interest in the estates, in respect of which such acknowledgment was taken, without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said E. F. [*declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest, of which declaration of the said E. F. this deponent has no reason to doubt the truth, and he verily believes the same to be true;*] [*or, "declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent further saith, that before her acknowledgment was so taken, he was satisfied, and does now verily believe that such provision has been made by deed or writing (or that the terms thereof have been reduced into writing), and that such deed or writing has been produced to the said commissioners."*] And lastly, this deponent saith, that it appears by the deed acknowledged by the said E. F., that the premises wherein she is stated to be interested are described to be in the parish [*or, place*] of — [*or, parishes or places*] of — and — in the county of — [*or, counties of —*] as the case may be.

Sworn, &c.

No. 2.

Affidavit verifying the Certificate of Acknowledgment by two Married Women, to be made by a third party, (either an Attorney or not) and by an Attorney (not being a Commissioner for taking the Acknowledgment.)

[IN THE COMMON PLEAS.

A. B. of —, in the county of —, [state trade, profession, or calling], and C. D. of —, in the county of —, gentleman, one of the attorneys, [or, solicitors], of the court of —, severally make oath and say: and first this deponent A. B. for himself maketh oath and saith, that he knows E. F. the wife of F. F., and F. G. the wife of G. G., in the certificate hereunto annexed respectively mentioned, and that at the time of making such acknowledgment each of them the said E. F. and F. G. was of full age. And the said C. D. for himself maketh oath and saith, that the acknowledgments in the said certificate mentioned were made by the said E. F. and F. G., and the certificate signed by G. H. of —, in the — of —, gentleman, and I. K. of — in the — of —, gentleman, the commissioners in the said certificate mentioned, on the day and year therein mentioned, at —, in the — of —, in the presence of this deponent, and that at the time of making such acknowledgment each of them the said E. F. and F. G. was of competent understanding, and that each of them the said E. F. and F. G. knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent the said C. D. for himself further saith, that to the best of this deponent's knowledge and belief, the said G. H. [or, I. K.] one of the said commissioners, is not in any manner interested in the transaction giving occasion for such acknowledgments, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned. And this deponent, the said C. D. for himself further saith, that previous to the said E. F. and F. G. making the said acknowledgment, he this deponent inquired of each of them the said E. F. and F. G. whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates; and that in answer to such inquiry, each of them

the said E. F. and F. G. [declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest, of which declaration of the said E. F. and F. G. respectively, this deponent has no reason to doubt the truth, and he verily believes the same to be true.] [Or, "declared that a provision was to be made for each of them the said E. F. and F. G. in consequence of her giving up such her interest in the said estates. And this deponent C. D. for himself further saith, that before the acknowledgment of each of them the said E. F. and F. G. was so taken, he was satisfied and does now verily believe that such provisions have been made by deeds or writings, (or that the terms thereof respectively have been reduced into writing), and that such deeds or writings have been produced to the said commissioners."] And lastly, the said C. D. for himself further saith, that it appears by the deed acknowledged by the said E. F. and F. G. that the premises wherein they are stated to be interested are described to be in the parish [or, place] of — [or, parishes or places of — and —], in the county of — [or, counties of —] as the case may be.

Sworn, &c.

—♦—

No. 3.

Affidavit verifying the Certificate of Acknowledgment, to be made by one of the Commissioners taking the Acknowledgment (such Commissioner not being interested in the transaction giving occasion for such Acknowledgment, or concerned therein as the Attorney, Solicitor, or Agent, or as Clerk to any Attorney, Solicitor or Agent, so interested or concerned.)

IN THE COMMON PLEAS.

A. B. of —, in the — of —, gentleman, one of the attornies [or, solicitors] of the Court of —, and one of the commissioners mentioned in the certificate hereunto annexed, maketh oath and saith, that he knows E. F. the wife of F. F. in the said certificate mentioned, and that the acknowledgment therein mentioned was made by the said E. F. and the certificate signed by this deponent and C. D. of —, in the county of —, gentleman, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at

—, in the — of —, in the presence of this deponent, and that at the time of making such acknowledgment, the said E. F. was of full age and competent understanding, and that the said E. F. knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made: And this deponent further saith, that he this deponent is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned: And this deponent further saith, that previous to the said E. F. making the said acknowledgment, he this deponent inquired of the said E. F. whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said E. F. [declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest, of which declaration of the said E. F. this deponent has no reason to doubt the truth, and he verily believes the same to be true.] [Or, “declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent further saith, that before her acknowledgment was so taken, he was satisfied and does now verily believe that such provision has been made by deed or writing (or that the terms thereof have been reduced into writing) and that such deed or writing has been produced to the said commissioners.”] And lastly, this deponent saith, that it appears by the deed acknowledged by the said E. F. that the premises wherein she is stated to be interested are described to be in the parish [or, place] of — [or, parishes or places of —, and —] in the county of — [or, counties of —] as the case may be.

Sworn, &c.

No. 4.

Affidavit verifying the Certificate of Acknowledgment, to be made by a third party, (either an Attorney or not), and by a Commissioner (not being interested or concerned.)

IN THE COMMON PLEAS.

A. B. of —, in the — of — [*state trade, profession or calling,*] and G. H. of —, in the — of —, gentleman, one of the attorneys [*or, solicitors*] of the Court of —, and one of the commissioners mentioned in the certificate hereunto annexed, severally make oath and say: And first this deponent A. B. for himself maketh oath and saith, that he knows E. F. the wife of F. F. in the certificate hereunto annexed mentioned, and that at the time of making such acknowledgment the said E. F. was of full age. And the said G. H. for himself maketh oath and saith, that the acknowledgment in the said certificate mentioned was made by the said E. F. and the certificate signed by this deponent and I. K. of —, in the — of —, gentleman, the commissioners in the said certificate mentioned, on the day and year therein mentioned, at —, in the — of —, in the presence of this deponent, and that at the time of making such acknowledgment the said E. F. was of competent understanding, and that the said E. F. knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent the said G. H. for himself further saith, that he this deponent, one of the said commissioners, is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned. And this deponent the said G. H. for himself further saith, that previous to the said E. F. making the said acknowledgment, he this deponent inquired of her the said E. F. whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry, the said E. F. [declared that she did intend to give up her interest in the said estates without having any provision made for her, in lieu of or in return for or in consequence of her so giving up such her

interest, of which declaration of the said E. F. this deponent has no reason to doubt the truth, and he verily believes the same to be true.] [Or, "declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent G. H. for himself further saith, that before her acknowledgment was so taken, he was satisfied and does now verily believe that such provision has been made by deed or writing, (or that the terms thereof have been reduced into writing,) and that such deed or writing has been produced to this deponent and the said I. K. the other commissioner."'] And lastly, the said G. H. for himself further saith, that it appears by the deed acknowledged by the said E. F. that the premises wherein she is stated to be interested are described to be in the parish [or, place] of — [or, parishes or places of — and —] in the county of — [or, counties of —] as the case may be.

Sworn, &c.

Affidavits must be engrossed on parchment, and sworn before a judge of the Court of Common Pleas, or a commissioner of that court. See *ante*, p. 402—405. No stamp is now required on these affidavits. See *ante*, p. 400.

— ♦ —

SURRENDER out of Court by an equitable Tenant in Tail and his Trustee of the Copyhold Parts of the Estate, in pursuance of the covenant contained in last Deed, ante, pp. 576—578.

MANOR OF DALE, } WHEREAS [recite the settlement creating
IN THE
COUNTY OF —. } the entail, the admission of the trustees,
the death of the tenant for life, and of one of the trustees,
ante, pp. 568—570.] NOW THEREFORE BE IT REMEM-
BERED, that on the — day of —, in the year
of our Lord 18—, C. D. of &c. and B. Adams, of
&c. esq. copyhold tenants, or one of them, a copyhold
tenant of the said manor, came before me, John Giles,
steward of the said manor and courts thereof, and for
defeating all estates tail of the said B. Adams of and in
the lands and hereditaments intended to be hereby sur-
rendered, and all remainders, reversions, estates, interests
and powers to take effect after the determination or in
defeasance of such estates tail, (and in consideration of
the sum of 900*l.* of lawful money of Great Britain to the

said B. Adams well and truly paid by [name and description of the purchaser] at or immediately before the passing of this surrender, in full for the absolute purchase of the lands and hereditaments intended to be hereby surrendered, and the inheritance thereof in possession, according to the custom of the said manor) he the said C. D. (at the request and by the direction of the said B. Adams, testified by his signing this surrender) and also the said B. Adams, under and by virtue and in pursuance of the powers and provisions for that purpose given by and contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple Modes of Assurance," did, and each of them did, out of court, according to the custom of the said manor, surrender out of their and each of their hands into the hands of the lord of the said manor, by the hands of me the said steward, by the rod, in the presence and testimony of —, a credible person attesting the same, All and every the messuages, lands, tenements and hereditaments whatsoever of them the said C. D. and B. Adams, and each of them, holden of the said manor by copy of court roll, with their and every of their rights, members, privileges, easements and appurtenances, (g) And the reversion and reversions, remainders and remainders, yearly and other rents, issues, and profits thereof; and all the estate, right, title, interest, use, trust, inheritance, property, claim and demand whatsoever, legal and equitable, of them the said C. D. and B. Adams, and each of them, of, in, to, or out of the same premises and every part thereof, with the appurtenances, TO THE ONLY USE AND BENEFIT of the said [purchaser] his heirs and assigns for ever, absolutely and without any manner of condition whatsoever.

[Signatures of C. D. and B. Adams.]

Taken and accepted the — day

of —, 18—, by me, [Signature of Steward.]

Steward of the said Manor.

In the presence of [Signature of Witness.]

(g) Where the surrenderors hold other copyholds of the manor, besides those intended to be surrendered, there must be a description of the parcels sold, or an exception of such parts as are intended to be retained.

No. II.

IRANT by a Tenant in Tail in Remainder with the Consent of the Protector of the Settlement, for the Purpose of barring the Estate Tail and all Remainders expectant thereon.

THIS INDENTURE, made the — day of —, in the Partes.
 Year of our Lord 18—, between William Evans, of &c.
 esq. of the first part; Edward Evans, of &c. esq. (the
 eldest son and heir of the body of the said William
 Evans), of the second part; and A. B. of &c. of the
 third part: WHEREAS Hugh Evans, late of &c. esq. being, at the date and execution of his will hereinafter
 recited, and thenceforth to the time of his decease, seised
 of an estate of inheritance in fee simple in possession
 of and in the messuages, lands, tenements, and heredita-
 ments hereinafter described, and intended to be hereby
 granted, duly made, signed, and published his last will
 and testament in writing, bearing date the 10th day
 of May, 1806, executed and attested in such manner
 as is by law required for rendering valid the devise of
 freehold estates, and thereby gave and devised all and
 every the messuages, lands, tenements, and other he-
 reditaments, situate, lying, and being in the several
 parishes of A., B., and C., or elsewhere, in the county
 of Essex, of or to which the said Hugh Evans, or any
 person or persons in trust for him, was or were seised or
 entitled for an estate of freehold and inheritance in fee
 simple, in possession, remainder, reversion, or expectancy,
 with their and every of their appurtenances, to the uses,
 upon the trusts, and for the ends, intents, and purposes,
 and with, under, and subject to the powers, provisos,
 and declarations thereafter declared and in part herein-
 after mentioned; that is to say, to the use of his (the
 said testator's) son, the said William Evans, and his
 assigns, for and during the term of his natural life, with-
 out impeachment of or for any manner of waste; and,
 after the determination of that estate by any means in
 his lifetime, to the use of C. D., of &c. esq. and E. F.,
 of &c. gentleman, and their heirs, during the life of the
 said William Evans, upon trust, by the usual ways and
 means, to preserve the contingent remainders therein
 after limited from being defeated or destroyed; and from

Recital of
 will creating
 the entail.

Death of testator.

Agreement of protector to consent.

Testatum.
Grant by tenant in tail.

and after the decease of the said William Evans, to the use of the first and other sons of the said William Evans successively in tail, so that the elder of such sons, and the heirs of his body issuing, might be preferred to and take before the younger of such sons and the heirs of their respective bodies issuing, with divers remainders over: AND WHEREAS the said Hugh Evans departed this life on or about the 6th day of April, 1808, without having altered or revoked his said will: AND WHEREAS the said Edward Evans, as the eldest son and heir of the body of the said William Evans, is entitled to an estate tail in remainder immediately expectant upon the decease of the said William Evans, in the messuages, lands, and hereditaments hereby granted, or expressed and intended so to be: AND WHEREAS the said W. Evans, as the protector of the settlement made by the said recited will, and in order to enable the said E. Evans to make such disposition and conveyance as are hereinafter contained effectual against all persons claiming after the determination or in defeasance of the estate tail of the said E. Evans, has agreed, at the request of the said E. Evans, to consent to the same in manner hereinafter expressed: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in order to defeat and destroy all estates tail of the said E. Evans in the messuages, lands, and hereditaments hereby granted, or expressed and intended so to be, and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates tail, and in order to convey and assure the inheritance in fee simple in remainder expectant upon the decease of the said W. Evans in the same hereditaments, unto and to the use of the said E. Evans, his heirs and assigns: He the said Edward Evans, under and by virtue and in pursuance of the powers and provisions for that purpose given by and contained in an act of parliament passed in the session of parliament held in the third and fourth years of the reign of his Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," and with the consent and approbation of the said William Evans, as such protector as aforesaid, testified by his being a party to and sealing and delivering these presents, hath granted, disposed of, and confirmed, and by these presents doth grant, dispose of, and confirm (r) unto the

(r) The usual practice is to convey a remainder or reversion in *corporeal* hereditaments by lease and release, or by a

said A. B. and his heirs, All that the remainder of him the said Edward Evans, expectant and to take effect upon the decease of the said William Evans, of and in all, &c. [*parcels and general words*]: and the reversion, &c. and all the estate, &c. (see *ante*, p. 572.) To HAVE *Habendum.* AND TO HOLD the said messuages, lands, tenements, hereditaments, and all and singular other the premises hereby granted, or expressed and intended so to be, (subject and without prejudice to the estate for life of the said William Evans,) and all powers, exemptions, and privileges (except the power of consenting as protector), annexed to such estate, unto the said A. B. and his heirs, To the only use and behoof of the said Edward Evans, his heirs and assigns, for ever, freed and absolutely discharged of and from the estate tail of the said Edward Evans, and all remainders, reversions, estates, rights, interests and powers to take effect after the determination or in defeasance of such estate tail. [*When it is intended to bar dower, the limitation or declaration may be here inserted.* See *ante*, p. 574.] IN WITNESS, &c. (s)

deed made in pursuance of 4 & 5 Vict. c. 21, *ante*, p. 562, because it supersedes the necessity of proving the existence of the prior particular estates.

(s) This deed must be inrolled in Chancery within six calendar months after its execution; (see *ante*, p. 330.)

By the Stamp Act, (55 Geo. 3, c. 184, sch. part 1,) a *bargain and sale* (to be inrolled) of any estate of freehold in lands or other hereditaments in England, upon any *other* occasion than the sale or mortgage thereof, requires a stamp of £5. And it is stated in a very useful work, (9 Jarm. Prec. 435,) "not to be quite clear that this duty would attach to any conveyance not taking effect as a bargain and sale properly so called; and that it is advisable to avoid the question by stamping every *disentailing assurance*, in whatever form made, on any other occasion than that of a sale or mortgage, with a £5 stamp." It is, however, submitted to be unnecessary to incur that expense where a bargain and sale is not used, for as no stamp duty has been specifically imposed on a *disentailing assurance*, it must, when the only object is to bar an entail, come within the description, "Conveyance of any kind whatever, not otherwise charged (in the first schedule to the Stamp Act) nor expressly exempted from all stamp duty." And, consequently, a £1: 15s. stamp will be sufficient. There is nothing in the Stamp Act imposing the additional duty of £5 on a deed *inrolled*, unless it be a bargain and sale, and how can inrolment only change the amount of duty or the nature of the instrument? See 55 Geo. 3, c. 184, s. 10. It may, however, be prudent to omit the words "bargain and sell" in an assurance intended not to operate as a bargain and

sale. An instrument containing the words "*grant, bargain, and sell,*" intended by the parties to take effect as a bargain and sale, and *duly enrolled as such*, was held to operate as a grant, because the evident design of the parties in making the assurance would have been defeated if it had been construed as a bargain and sale. (*Haggerston v. Hamburg*, 5 B. & C. 101; 7 D. & Ry. 723. See *Miller v. Gross*, 1 Cr. & J. 148; 8 Bing. 92; *Pascoe v. Pascoe*, 3 Bing. N. C. 898; *Pentland v. Healey*, 1 Alc. & Nap. 165; *Avery v. Cheslyn*, 5 Nev. & M. 372; 3 Ad. & Ell. 75.) It is stated in a learned work (2 Sugd. V. & P. 290,) "that although both deeds must be enrolled, yet a lease and release by a tenant in tail will still operate as a conveyance, as they did before the late statute, the lease for a year as a bargain and sale, and the release as such; and the enactment will not of itself alter the operation of either of the instruments, and consequently by such a conveyance an estate tail and remainders may be barred, and the fee limited to any uses and with any powers authorized by law. No other alteration ought to be made in a lease and release, as a disposition under the statute, than a recital or declaration in the release of the intention to bar the estate tail and remainders over, although the disposition will have that operation without any such recital."

No. III.

CONVEYANCE by the owner of a Base Fee for the Purpose of enlarging it into a Fee Simple absolute. See 3 & 4 Will 4, c. 74, s. 19, ante, p. 304. (a)

THIS INDENTURE, made the — day of —, in the year of our Lord 18—, between Edward Evans, of &c. esq. [*the owner of the base fee,*] (the eldest son and heir of the body of William Evans, of &c. esq. deceased,) of the one part, and A. B., [*the releasee,*] of the other part: WHEREAS [*recital of will creating the entail and death of testator, ante, p. 591*]: AND WHEREAS, under and by virtue of an indenture bearing date on or about the 1st day of May, 1832, and made, or expressed to be made, between the said Edward Evans, of the one part, and C. D. of the other part, and by a fine *sur concessione & droit come ceo*, &c. acknowledged and levied by the said Edward Evans before his majesty's justices of the Court of Common Pleas at Westminster, in or as of Trinity

Fine levied
by tenant in
tail in re-
mainder.

(a) Where there is a protector of the settlement creating the entail which has been converted into a base fee, the owner of it cannot acquire the fee simple absolute without the consent of such protector. (See 3 & 4 Will. 4, c. 74, s. 35; ante, p. 323.)

arm, 1832, in pursuance of a covenant or agreement
 contained in the same indenture; and a declaration of
 uses of the same fine therein contained, the messuages,
 lands, and hereditaments hereby granted and released,
 or expressed and intended so to be, were duly limited and
 assured (subject and without prejudice to the estate for
 life of the said William Evans in the same hereditaments,)

unto and to the use of the said Edward Evans, his heirs
 and assigns for ever. AND WHEREAS the said William Evans

departed this life on or about the 1st day of June, 1834,

whereupon the said E. Evans became entitled to a base fee in possession in the said hereditaments; and the said E. Evans is desirous of enlarging such base fee into a fee simple absolute:

NOW THIS INDENTURE WITNESSETH, that in order to enlarge the base fee of the said E. Evans in the messuages, lands, and hereditaments hereby granted and released, or expressed and intended so to be, into a fee simple absolute, and to defeat and destroy all estates tail, remainders, reversions, rights, titles, interests, and powers, to take effect after the determination or in defeasance of the base fee into which the estate tail of the said E. Evans has been converted as aforesaid; and in order to limit and assure the inheritance in fee simple in possession in the same hereditaments to the use of the said E. Evans, his heirs and assigns for ever, he the said E. Evans, under and by virtue and in pursuance of the powers and provisions for that purpose given by and contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple modes of Assurance," hath granted, aliened, disposed of, released, and confirmed, and by these presents, made in pursuance of the act passed in the session of parliament held in the fourth and fifth years of the reign of her majesty Queen Victoria, intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties," doth grant, alien, dispose of, release and confirm, unto the said A. B., All that, &c. [*parcels, general words, and the reversion and all the estate, &c. ante, p. 572.*] To HAVE AND TO HOLD the said messuages, lands, tenements, hereditaments, and all and singular other the premises hereby granted and released, or expressed and intended so to be, with their and every of their rights and appurtenances, unto the said A. B. and his heirs, To THE ONLY USE AND BEHOOF of the said E. Evans, his heirs and

Death of
 tenant for
 life.

TESTATUM.
 Owner of
 base fee con-
 vey for the
 purpose of
 enlarging it
 into a fee
 simple abso-
 lute.

assigns for ever, and to and for no other use, intent, or purpose whatsoever. [*If the party was not married on or before 1st January, 1834, and it is intended to bear dowry, the declaration, ante, p. 574, should be added.*] IN WITNESS, &c. (b)

(b) This deed must be inrolled, within six calendar months after its execution, in Chancery. (*Ante*, p. 330, s. 41.)

No. IV.

CONVEYANCE by Bargain and Sale (to be inrolled in Chancery) by a Tenant in Tail in Remainder, without the Consent of the Protector of the Settlement, with a Covenant to complete the Title at a future period—and a proviso for determining the Purchase and Repayment of the Purchase-Money, if the Title be not perfected.

THIS INDENTURE, made the — day of —, in the year of our Lord 18—, between Edward Evans, of &c. esq. (the eldest son and heir of the body of William Evans, of &c. esq.) of the one part, and [*the purchaser*] of the other part. WHEREAS [*recital of will creating the entail and death of the testator, ante, p. 591, 592.*] AND WHEREAS the said E. Evans, as the eldest son and heir of the body of the said W. Evans, is seised or entitled to an estate tail in the messuage, lands, and hereditaments hereby bargained and sold, or expressed and intended so to be, in remainder expectant upon the decease of the said W. Evans, and the said E. Evans has issue six children now living, namely, [*names of children.*] (a) AND WHEREAS the remainder in fee simple expectant upon the decease of the said W.

Recitals of
vendor's title.

Of sale by
auction.

(a) A tenant in tail in remainder, without the consent of the protector of the settlement, can only convey a base fee, which will endure so long as such tenant in tail has issue of his body, on the failure of which, unless the base fee be subsequently enlarged, the remainders over will take effect. It would not therefore be prudent for a purchaser to take a conveyance from a tenant in tail in remainder, without the protector's consent, unless there is issue, which will probably live until the title can be perfected, and reliance can be placed on the covenant of the vendor for securing to the purchaser the damage he will sustain by the non-performance of the covenant to complete the title. Hence, in cases of this kind, it will often be necessary to invest the purchase-money in the names of trustees until the title shall be completed.

vans, in the messuage, lands, and hereditaments hereby bargained and sold, or expressed and intended so to be, as, on the — day of March now last past, put up to sale by public auction at the Crown Inn, situate at —, in the county of —, in one lot, and at such sale the said [purchaser] was the highest bidder thereat, and declared to be the purchaser of the same hereditaments at or for the price or sum of 1000*l.* (b). AND WHEREAS the said W. Evans, as the protector of the settlement made by the said recited will, has refused to consent to the disposition of the said hereditaments by the said E. Evans, but the said [purchaser] has consented to accept in the first instance a conveyance from him without such consent, on his entering into such covenant for completing the title of the said [purchaser] to be fee simple absolute in the same hereditaments as is hereinafter contained: NOW THIS INDENTURE WITNESSETH, that for carrying the aforesaid sale and agreement into effect, and in consideration of the sum of 1000*l.* of lawful money of Great Britain to the said E. Evans in hand well and truly paid by the said [purchaser] at or before the sealing and delivery of these presents, in full for the absolute purchase of the fee simple and inheritance of the hereditaments hereby bargained and sold, or intended so to be, subject only to the estate for life of the said W. Evans therein, but free from all other incumbrances, the receipt of which said sum of 1000*l.* the said E. Evans doth hereby admit and acknowledge, and of and from the same and every part thereof doth acquit, release, and forever discharge the said [purchaser], his heirs, executors, administrators, and assigns, and every of them, by these presents, and in order to defeat the estate tail of the said E. Evans under the said recited will in the same heredi-

Refusal of
protector to
consent.

Testatum.
Tenant in tail
in remainder
conveys to
purchaser in
fee.

(b) It must be remembered, that expectant heirs and the owners of reversionary interests are entitled for mere inadequacy of consideration to have the contract rescinded upon terms of redemption. (See 2 Swanst. 139 n. (a), and the numerous cases there cited.) But the rule does not extend to sales by auction, (*Shelley v. Nash*, 3 Madd. 232,) nor to the sale by a father, tenant for life, and his son, tenant in tail in remainder, who form a vendor with a present interest, and meet a purchaser with the same advantages as if a single person had the whole power over the estate. (*Wood v. Abrey*, 3 Madd. 417; see *Fox v. Wright*, 6 Madd. 111; *Marsack v. Reeves*, 6 Madd. 109; *Wethered v. Wethered*, 2 Sim. 183; *Harwood v. Tooke*, Id. 192; *Earl Portmore v. Taylor*, 4 Sim. 182; *King v. Hamlet*, Id. 223; 2 My. & K. 456; *Wardle v. Carter*, 7 Sim. 490; 1 Sugd. V. & P. 444—467, 10th ed.)

Covenants
for title.

taments, and to convey a base fee therein in remainder immediately expectant upon the decease of the said W. Evans unto the said [*purchaser*], his heirs and assigns. He the said E. Evans, under and by virtue and in pursuance of the powers and provisions given by and contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," hath granted, bargained, sold, disposed of, and confirmed, and by these presents doth grant, bargain, sell, dispose of, and confirm unto the said [*purchaser*] and his heirs, All [*parcels, general words, remainder, &c. all the estate, &c. ante, p. 572.*] To HAVE AND TO HOLD the said messuage, lands, hereditaments, and all and singular other the premises hereby bargained and sold, or expressed and intended so to be, with their and every of their appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns, subject to the estate for life of the said W. Evans, and the remainders, estates, rights, interests, and powers to take effect after the determination, or in defeasance of the base fee into which the estate tail of the said E. Evans is converted by these presents, [*if the vendor has the ultimate remainder or reversion, add these words, "except the ultimate remainder or reversion so limited to or vested in the said [vendor], his heirs and assigns, as aforesaid."*] AND the said E. Evans for himself, his heirs, executors and administrators, doth hereby covenant with the said [*purchaser*], his heirs and assigns, in manner following; (that is to say,) that notwithstanding any act or deed by him the said E. Evans or the said [*the testator*] committed or executed to the contrary, he the said Evans, at the time of the execution of these presents, is lawfully and absolutely seized of and in, or well and sufficiently entitled to the said messuage, lands, and other hereditaments hereby bargained and sold, or expressed and intended so to be, and every part thereof, with their appurtenances, for a good and sole estate of inheritance in tail general in remainder immediately expectant upon the decease of the said W. Evans: And that notwithstanding any such act or deed as aforesaid, he the said E. Evans now hath in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, dispose of, and confirm the messuage, lands, and other hereditaments hereinbefore bargained and sold, or expressed and intended so to be, with the appurtenances

reunto belonging, unto the said [*purchaser*], his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: and that it shall be lawful for the said [*purchaser*], his heirs and assigns, immediately upon and after the determination of the estate for life of the said W. Evans, and from time to time and at all times thereafter, unless and until the said purchase shall be determined in pursuance of the proviso hereinafter contained, peaceably and quietly to enter into and upon, and to hold, occupy, possess, and enjoy the said messuage, lands, and other hereditaments hereinbefore bargained and sold, or expressed and intended to be, with their appurtenances, and to have, receive and take the rents, issues, and profits thereof, and of every part thereof, for his and their own use and benefit, without any let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever of or by him the said E. Evans, his heirs or issue in tail, or of or by any other person or persons lawfully or equitably claiming or to claim, by, from, or under or in trust for him, them, or any of them, or by, from, or under the said [*the testator*]. And that freely, clearly, and absolutely acquitted, released, and for ever discharged or otherwise by the said E. Evans, his heirs, executors or administrators, well and efficiently kept harmless and indemnified from and against all former and other gifts, grants, bargains, sales, leases, troubles, charges, and incumbrances whatsoever, either already made, executed, occasioned, or suffered, or hereafter to be made, executed, occasioned, or suffered by the said E. Evans, or his heirs or issue in tail, or by any person or persons lawfully or equitably claiming or to claim by, from, or under or in trust for him, them, or any of them, or by the said [*the testator*] or any person claiming under him, except in respect of the estate for life of the said W. Evans. (c) AND FURTHER, that the said E. Evans, his heirs and issue in tail, and all and every other person and persons having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, or property, either at law or in equity,

Free from incumbrances.

For further assurance.

(c) Where the purchaser has contracted for the purchase of the absolute fee, and agrees in the first instance to accept a conveyance of only a base fee, the interests of those claiming after the determination of the base fee should not be excepted in this covenant nor in the covenant for further assurance, although such an exception should be made where the vendor does not undertake that those claiming in remainder shall perfect the title.

Covenants
for title.

taments, and to convey a base fee therein in remainder immediately expectant upon the decease of the said W. Evans unto the said [*purchaser*], his heirs and assigns. He the said E. Evans, under and by virtue and in pursuance of the powers and provisions given by and contained in an act of parliament made and passed in the session of parliament held in the third and fourth year of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," hath granted, bargained, sold, disposed of, and confirmed, and by these presents doth grant, bargain, sell, dispose of, and confirm unto the said [*purchaser*] and his heirs, All [*parcels, general words, remainder, &c. all the estate, &c. ante, p. 572.*] TO HAVE AND TO HOLD the said messuage, lands, hereditaments, and all and singular other the premises hereby bargained and sold, as expressed and intended so to be, with their and every of their appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns, subject to the estate for life of the said W. Evans, and the remainders, estates, rights, interests, and powers to take effect after the determination, or in defeasance of the base fee into which the estate tail of the said E. Evans is converted by these presents [*if the vendor has the ultimate remainder or reversion, add these words, "except the ultimate remainder or reversion so limited to or vested in the said [vendor], his heirs and assigns, as aforesaid."*] AND the said E. Evans for himself, his heirs, executors and administrators, doth hereby covenant with the said [*purchaser*], his heirs and assigns, in manner following; (that is to say,) that notwithstanding any act or deed by him the said E. Evans or the said [*the testator*] committed or executed to the contrary, he the said Evans, at the time of the execution of these presents, is lawfully and absolutely seized of and in, or well and sufficiently entitled to the said messuage, lands, and other hereditaments hereby bargained and sold, or expressed and intended so to be, and every part thereof, with their appurtenances, for a good and sole estate of inheritance in tail general in remainder immediately expectant upon the decease of the said W. Evans: And that notwithstanding any such act or deed as aforesaid, he the said E. Evans now hath in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, dispose of, and confirm the messuage, lands, and other hereditaments hereinbefore bargained and sold, or expressed and intended so to be, with the appurtenances

preunto belonging, unto the said [purchaser], his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: and that it shall be lawful for the said [purchaser], his heirs and assigns, immediately upon and after the determination of the estate for life of the said W. Evans, and from time to time and at all times thereafter, unless and until the said purchase shall be determined in pursuance of the proviso hereinafter contained, peaceably and quietly to enter into and upon, and to hold, occupy, possess, and enjoy the said messuage, lands, and other hereditaments hereinbefore bargained and sold, or expressed and intended to be, with their appurtenances, and to have, receive and take the rents, issues, and profits thereof, and of every part thereof, for his and their own use and benefit, without any let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever of or by him the said E. Evans, his heirs or issue in tail, or of or by any other person or persons lawfully or equitably claiming or to claim, by, from, or under or in trust for him, them, or any of them, or by, from, or under the said [the testator]. And that freely, clearly, and absolutely acquitted, released, and for ever discharged or otherwise by the said E. Evans, his heirs, executors or administrators, well and sufficiently kept harmless and indemnified from and against all former and other gifts, grants, bargains, sales, leases, troubles, charges, and incumbrances whatsoever, either already made, executed, occasioned, or suffered, or hereafter to be made, executed, occasioned, or suffered by the said E. Evans, or his heirs or issue in tail, or by any person or persons lawfully or equitably claiming or to claim by, from, or under or in trust for him, them, or any of them, or by the said [the testator] or any person claiming under him, except in respect of the estate for life of the said W. Evans. (c) AND FURTHER, that the said E. Evans, his heirs and issue in tail, and all and every other person and persons having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, or property, either at law or in equity,

Free from incumbrances.

For further assurance.

(c) Where the purchaser has contracted for the purchase of the absolute fee, and agrees in the first instance to accept conveyance of only a base fee, the interests of those claiming after the determination of the base fee should not be accepted in this covenant nor in the covenant for further assurance, although such an exception should be made where the vendor does not undertake that those claiming in remainder shall perfect the title.

of, in, to, or out of the said messuage, lands, and other hereditaments hereinbefore bargained or sold, or expressed and intended so to be, or any of them, or any part thereof, by, from, or under or in trust for the said E. Evans, his heirs or issue in tail, or any of them, or by, from, or under the said [*the testator*], (except the said W. Evans or his assigns, in respect only of his estate for life, and as protector of the settlement made by the said recited will,) shall and will, from time to time and at all times hereafter (unless and until the said purchase shall be determined in pursuance of the proviso hereinabove contained), upon every reasonable request, and at the proper costs and charges in the law of the said [*purchaser*], his heirs or assigns, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, releasing, conveying, confirming, or otherwise assuring the said messuage, lands, and other hereditaments hereinbefore bargained and sold, or expressed and intended so to be, and every part thereof, with their appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns, or otherwise, as he or they shall direct or appoint, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required, and as shall be tendered to be done and executed. AND MOREOVER, that he the said E. Evans shall and will, immediately after the decease of the said W. Evans, or as soon as circumstances will permit, and he shall be able and competent so to do, at the costs and charges of the said E. Evans, his executors or administrators, make, do, and execute all such acts, deeds, conveyances, and assurances as shall be necessary, and as the said [*purchaser*], his heirs and assigns, or his or their counsel in the law, shall reasonably advise or require, for effectually defeating all remainders, reversions, estates, rights, interests, and powers, to take effect under and by virtue of the said recited will after the determination or in defeasance of the base fee of the said [*purchaser*], his heirs and assigns, in the said messuage, lands, and hereditaments hereby bargained and sold, or expressed and intended so to be, and for enlarging the base fee of the said [*purchaser*], his heirs or assigns, in the same hereditaments, into a fee simple absolute, and for perfecting his or their title to the same: AND that in case the said

Covenant to
perfect the
title.

Evans shall happen to depart this life before such acts, deeds, conveyances, and assurances as last aforesaid shall made and perfected, then and in such case the executors or administrators of the said E. Evans shall and will, at their own costs and charges, cause or procure the same (d) in tail of the said E. Evans, or other the person or persons who shall be entitled in remainder or reversion immediately expectant upon the determination of the base fee hereby created or intended so to be, when and so soon circumstances will permit, in like manner to make, do, and execute all such acts, deeds, conveyances, and assurances as shall be necessary, and as the said [purchaser], his heirs or assigns, or his or their counsel in the law, shall reasonably advise or require, for effectually defeating all remainders, reversions, estates, rights, interests, and powers, to take effect under and by virtue of the said executed will, after the determination or in defeasance of the base fee of the said [purchaser], his heirs and assigns, the said hereditaments, and for enlarging such base fee of the said [purchaser], his heirs and assigns, into a fee simple absolute, and for perfecting his or their title to the same, or for conveying and assuring the remainder or reversion in the said hereditaments expectant upon the base fee, into which the estate tail of the said E. Evans is intended to be converted by these presents, unto and to the use of the said [purchaser], his heirs and assigns; and it is hereby agreed and declared, that no further or other consideration shall be payable by the said [purchaser], his heirs or assigns, in respect of any estate or interest to be conveyed and assured in pursuance of the covenant lastly hereinbefore contained: Provided always, and it is hereby agreed and declared between and by the parties to these presents, that in case the said E. Evans, or his issue in tail, or the person or persons entitled in remainder or reversion expectant upon the determination of the base fee into which the estate tail of the said E. Evans is converted by these presents, or such of the same

Proviso for determining purchase, and for repayment of purchase money in case of non-performance of last covenant.

(d) It is to be observed, that a covenant of this kind will not bind the issue in tail, (see *ante*, s. 40, p. 329, n. (i),) nor those in remainder; and in case of their refusal to perform it, the only remedy of the purchaser will be an action on the covenant against the representatives of the vendor. It is advisable, when practicable, to obtain a demise from the vendor of another estate to a trustee upon trust to raise the purchase money for the benefit of the purchaser, in the event of his title not being perfected within a limited time.

issue, or persons whose concurrence is requisite for performing the covenant lastly hereinbefore contained, shall not make and execute such conveyances and assurances as are lastly hereinbefore covenanted to be made and executed within the space of six calendar months after he or they shall be able and competent so to do, then and in such case it shall be lawful for the said [*purchaser*], his heirs or assigns, at his or their option, at any time during the life of the said [*purchaser*], or within the space of twenty-one years after his decease, to determine the said purchase by giving notice in writing of his or their intention so to do to the said E. Evans, his executors or administrators, and that in case such purchase shall be so determined, he the said E. Evans, his heirs, executors, or administrators, shall and will well and truly pay or cause to be paid to the said [*purchaser*], his executors, administrators, or assigns, the sum of 1000*l.* of lawful money of Great Britain, with interest for the same, to be computed from the day of the date of these presents to the day on which payment of the said sum of 1000*l.* shall be actually made, and also so much money as a compensation for the repairs to the buildings on the hereditaments hereby bargained and sold, or expressed or intended so to be, and the common agricultural improvements which shall have been made thereon by the said [*purchaser*], his heirs or assigns, as shall be fixed by two indifferent persons, one to be named by the said E. Evans, his executors or administrators, and the other by the said [*purchaser*], his executors or administrators; or in case of the disagreement of such two persons first named in the premises, then so much money as shall be fixed by some indifferent person to be chosen as an umpire by such two persons, he the said [*purchaser*], his heirs, executors, or administrators, paying to the said E. Evans, his executors or administrators, so much money for the rent of the said hereditaments from the decease of the said W. Evans, and during the time the said [*purchaser*], his heirs or assigns, shall hold and enjoy the same, as shall be fixed by such two indifferent persons, or their umpire, to be chosen as aforesaid; and that upon payment of the said sum of 1000*l.* and interest, and such further sum of money as the said [*purchaser*], his executors or administrators, shall be entitled to receive as last aforesaid, the said [*purchaser*], his heirs and assigns, shall stand seised of the messuage, lands, and hereditaments hereby bargained and sold, or expressed and intended so to be, in trust to re-convey the same unto and to the use of the said E.

Evans, his heirs and assigns, unless the base fee hereby created shall have previously determined: Provided always, and it is hereby declared, that nothing herein contained shall exclude or bar, or be deemed or construed to exclude or bar, the said [*purchaser*], his heirs or assigns, from proceeding either at law or in equity against the said E. Evans, his executors or administrators, for compelling him or them specifically to perform the covenant hereinbefore contained for perfecting the title of the said [*purchaser*], his heirs and assigns, to the fee simple absolute in the said hereditaments, unless the said [*purchaser*], his heirs or assigns, shall declare his or their option to determine the said purchase as aforesaid. IN WITNESS, &c.

No. V.

CONVEYANCE by Bargain and Sale (to be inrolled in Chancery) by indorsement on last Deed, for completing the Title of a Purchaser entitled to a Base Fee under the Assurance of a Tenant in Tail in Remainder.

THIS INDENTURE, made the — day of —, in the year of our Lord 1835, between the within-named E. Evans, of the one part, and the within-named [*purchaser*], of the other part; WHEREAS (a) the within-named W. Evans, the protector of the settlement made by the will recited in the within-written indenture, departed this life on or about the — day of — now last past; AND WHEREAS the said E. Evans has agreed specifically to perform the covenant contained in the within-written indenture for completing the title of the said [*purchaser*] to the messuages, lands, and hereditaments, by the same indenture bargained and sold, or expressed and intended so to be: NOW THEREFORE THIS INDENTURE WITNESSETH, that in pursuance and performance of the said covenant, and in consideration of the sum of 10s. of lawful money of Great Britain to the said E. Evans paid by the said [*purchaser*] immediately before the execution of these presents, the receipt whereof is hereby acknowledged, and in order to defeat all remainders, reversions, estates, rights, interests, and powers, to take effect after the determination or in defeasance of the base fee, into which

RECITALS.
Death of protector.

Agreement to perform covenant.

TESTATUM.
Tenant in tail bargains and sells to purchaser.

(a) Where this conveyance is not made by indorsement, the last deed should be recited as well as the instrument creating the entail to be barred.

the estate tail of the said E. Evans was converted by the operation of the within-written indenture, and in order to enlarge the base fee of the said [*purchaser*] in the hereditaments by the within-written indenture bargained and sold, or expressed and intended so to be, into a fee simple absolute, and to perfect the title of the said [*purchaser*] to the same, he the said E. Evans, under and by virtue and in pursuance of the powers and provisions given by and contained in an act of parliament made and passed in the session of parliament held in the 3rd and 4th years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," hath granted, bargained, sold, and confirmed, and by these presents doth grant, bargain, sell, and confirm unto the said [*purchaser*], his heirs and assigns, the messuage, lands, hereditaments, and all and singular other the premises by the within-written indenture bargained and sold, or expressed and intended so to be, with their and every of their rights, members, and appurtenances, and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the same hereditaments and premises, and every part thereof, and all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever of the said E. Evans in, to, or out of the same hereditaments and premises, and every part thereof: To HAVE AND TO HOLD the said messuage, lands, hereditaments, and all and singular other the premises hereby bargained and sold, or expressed and intended so to be, with their and every of their appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns for ever: And the said E. Evans doth hereby for himself, his heirs, executors, and administrators, covenant and declare with and to the said [*purchaser*], his heirs and assigns, that he the said E. Evans hath not at any time heretofore made, done, committed, or executed, or been party or privy to any act, deed, matter or thing whatsoever, whereby or by reason or means whereof the said messuage, lands, hereditaments and premises hereby bargained and sold, or expressed and intended so to be, or any of them, or any part thereof, are, is, can, shall, or may be conveyed, assured, impeached, charged, or incumbered in title, estate, or otherwise howsoever (save and except by the within-written indenture and these presents). IN WITNESS, &c.

Covenant
against in-
cumbrances.

No. VI.

Consent of the Protector of a Settlement to an absolute Disposition by a Tenant in Tail in Remainder. (See ante, p. 331, ss. 42, 43.)

TO ALL TO WHOM THESE PRESENTS SHALL COME, D. DUNN, of —, esq. [*the protector*], sends greeting: WHEREAS ^{Creation of entail.} by indentures of lease and release, bearing date respectively on or about the 9th and 10th days of March, '18—, the release being made or expressed to be made between [*names of parties*], divers messuages, farms, lands, and hereditaments in the several parishes of A., B., and C., in the county of York, in the said indentures particularly mentioned and described, with their appurtenances, were duly conveyed and assured, [*to the use of D. Dunn for life, with remainder to his first and other sons in tail, with divers remainders over*], AND WHEREAS Edward Dunn, of &c. esq. is the eldest son and heir of the body of the said D. Dunn, and under and by virtue of the limitations contained in the said recited indenture of release, is entitled to an estate tail in remainder immediately expectant on the decease of the said D. Dunn, of and in the messuages, farms, lands, and hereditaments comprised in the said recited indentures: AND WHEREAS, in order to enable ^{Agreement of protector to consent to disposition by tenant in tail.} the said E. Dunn to defeat all remainders, reversions, estates, rights, interests, and powers, to take effect after the determination or in defeasance of the estate tail of the said E. Dunn, of and in the messuages, farms, lands, and hereditaments comprised in the said recited indentures; the said D. Dunn, as the protector of the settlement made by the same indentures, has consented and agreed (at the request of the said E. Dunn) to give his unqualified consent and approbation, according to the directions for that purpose contained in an act of parliament made and passed in the session of parliament held in the 3rd and 4th years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," to any disposition, conveyance, or assurance hereafter to be made and executed by the said E. Dunn, of and concerning the said messuages, farms, lands, and hereditaments in manner hereinafter expressed: NOW ^{TESTATUM.} THESE PRESENTS WITNESS, that in pursuance and performance of said recited agreement, he the said D. Dunn doth by these presents give and grant his absolute and ^{Protector consents to absolute disposition by tenant in tail.}

unqualified consent and approbation to any conveyance, assurance, and disposition, which shall be made and executed by the said E. Dunn, either on the day of the date and execution of these presents, or at any time thereafter, of and concerning all or any part or parts of the messuages, farms, lands, tenements, and hereditaments comprised in and conveyed and assured by the hereinbefore recited indentures of lease and release, with their and every of their appurtenances; (a) subject nevertheless and without prejudice to the estate for life of the said D. Dunn, of and in the same hereditaments, and all powers, privileges, and exemptions, (except the power of consenting as protector,) annexed or incident to such estate. IN WITNESS, &c. (b)

(a) Where the consent is intended to be confined to part of the property comprised in the settlement, there must necessarily be a description of the parcels, to the disposition whereof the consent is to apply.

(b) This deed must be inrolled in Chancery at or before the time of the inrolment of the deed of disposition by the tenant in tail. (*Ante*, p. 332, s. 46.)

No. VII.

Consent of the Protector of a Settlement to a particular Disposition by a Tenant in Tail in Remainder. (*See ante*, p. 331, s. 43.)

TO ALL TO WHOM THESE PRESENTS SHALL COME, John Jones, of &c. [*the protector*], sends greeting: WHEREAS [*recital of deed or will creating the entail under which J. Jones is tenant for life, with remainder to D. Jones in tail, with divers remainders over*]: AND WHEREAS a marriage has been agreed upon and is intended to be shortly had and solemnized between the said D. Jones and Lucy Gay, of &c. spinster, and upon the treaty for such marriage it was agreed that the said D. Jones should settle and assure the messuages, lands, and hereditaments mentioned and comprised in, and intended to be conveyed and assured by, the indentures of lease and release hereinafter mentioned [*or recited*], to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations in the same indenture of release expressed,

Recital of intended marriage of tenant in tail.

declared, and contained of and concerning the same hereditaments: AND WHEREAS, in order to enable the said D. Jones to make such disposition, settlement, and assurance as are contained in the indentures of lease and release hereinafter mentioned [or recited], the said J. Jones, as the protector of the settlement made by the said *[deed or will creating the entail]*, has consented and agreed (at the request of the said D. Jones) to give his consent and approbation, according to the directions for that purpose contained in an act of parliament made and passed in the session of parliament held in the 3d and 4th years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," to the conveyance, disposition, and assurance intended to be made by the indentures of lease and release hereinafter mentioned [or recited.] *[It being obvious that the deed of consent and the assurance to which it refers should be connected with certainty, it will be advisable in some cases to recite in the former so much of the latter as will show the parcels intended to be included, and the proposed limitations as follows]:* And WHEREAS by indentures of lease and release already prepared and ingrossed, but intended to be executed after the execution of these presents, the lease bearing even date with these presents, and the release bearing date the day next after the day of the date of these presents, and made or expressed to be made between *[names and description of parties]*; All those *[description of parcels]*, are intended to be conveyed and assured by the said D. Jones, unto the said *[the trustees of the intended settlement]* and their heirs; To hold the same unto the said *[trustees]* and their heirs, (subject to the estate for life of the said J. Jones,) to the use &c. *[set forth the uses]*; Now THESE PRESENTS WITNESS, that in pursuance and performance of the said recited agreement on the part of the said J. Jones, he the said J. Jones, as such protector as aforesaid, doth, by these presents, give and grant his consent to such conveyance, assurance, and disposition, as are intended to be made and contained *[where the intended settlement is not recited]* in certain indentures of lease and release already prepared and ingrossed, but intended to be executed after the execution of these presents, the lease bearing even date with these presents, and the release bearing date the day next after the day of the date of these presents, and made, or expressed to be made, between *[names and descriptions of parties]*, *[or where the intended settlement is recited, in*

Protector's agreement to consent.

Recital of intended settlement.

TESTATUM. Protector consents to a particular disposition.

Consent con-
fined to par-
ticular dispo-
sition.

and by the said recited indentures of lease and release,] of and concerning the messuages, lands, and hereditaments, in the same indentures particularly mentioned and described, and intended to be thereby granted and released: Provided always and it is hereby declared, that the consent hereby or intended to be hereby given, is confined to the conveyance, assurance, and disposition lastly hereinbefore referred to, and shall not extend, nor be deemed or construed to extend to any other conveyance, assurance, or disposition made or executed, or to be made or executed, by the said D. Jones, of and concerning the said hereditaments, or any part thereof, nor prejudice or affect the estate for life of the said J. Jones, or any power, privilege or exemption (except the power of consenting as protector) annexed or incident to such estate. IN WITNESS, &c. (a)

(a) This deed must be inrolled in Chancery at or before the time of the inrolment of the deed of disposition by the tenant in tail. (See ante, p. 332, s. 46.)

No. VIII.

CONSENT of the Protector of a Settlement of Copyholds to an absolute Disposition by a Tenant in Tail in Remainder. (See ante, p. 339.)

Creation of
entail.

Admission of
tenant for
life.

Protector's
agreement to
consent.

TO ALL TO WHOM THESE PRESENTS shall come, A. B. of &c. esq. [the protector] sends greeting: WHEREAS under and by virtue of the last will and testament of [testator] bearing date the — day of — 18—, the said A. B. is tenant for life of the copyhold messuages, lands and hereditaments hereinafter mentioned, with remainder to C. D. and the heirs of his body, with divers remainders over; AND WHEREAS, at a court held in and for the manor of Dale in the county of —, the said A. B. was admitted tenant under and by virtue of the will of the said [testator] to divers messuages, lands, tenements and hereditaments holden of the said manor by copy of court roll, To hold the same to the said A. B. and his assigns during the term of his natural life, according to the form and effect of the will of the said [testator]; AND WHEREAS the said [tenant in tail in remainder] is desirous of acquiring an absolute estate of inheritance in fee simple in remainder, according to the

om of the manor of Dale aforesaid, expectant and to
 effect in possession on the decease of the said A. B.
 and in the said copyhold hereditaments and premises,
 hath applied to and requested the said A. B., as the
 protector of the settlement made by the said recited will,
 consent to an absolute disposition of such remainder
 the said [*tenant in tail in remainder*] in compliance
 with the directions for that purpose given by an act of
 parliament passed in the session of parliament held
 the third and fourth years of the reign of his
 Majesty King William the Fourth, intituled, "An Act
 the Abolition of Fines and Recoveries, and for the
 institution of more simple Modes of Assurance;" and
 the said A. B. has agreed to give such consent in manner
 hereinafter expressed: Now THESE PRESENTS WITNESS,
 that the said A. B. as such protector as aforesaid, and in
 compliance with the directions for that purpose contained
 in the said act of parliament, doth by these presents give
 and grant his absolute and unqualified consent and
 approbation to any disposition or surrender, dispositions
 surrenders, which shall be made and passed by the
 said [*tenant in tail in remainder*] either on the day of the
 date and execution of these presents, or at any time
 hereafter, according to the custom of the said manor, of
 land concerning all or any part or parts of the messuages,
 lands, tenements and hereditaments to which the said
 A. B. was admitted tenant as aforesaid (subject and with-
 out prejudice to the estate for life of the said A. B.
 therein) to and for such uses, trusts, intents and purposes
 in and by any such disposition or surrender, or disposi-
 tions or surrenders, shall be expressed, declared and
 contained of and concerning the same. IN WITNESS, &c.

TESTATUM.
 Protector
 consents to
 disposition by
 remainder-
 man.

MEMORANDUM to be indorsed on last Deed.

I, E. F., steward of the within-mentioned manor of
 Dale, do hereby acknowledge that the within-written
 deed poll, under the hand and seal of the within-named
 A. B. was produced to me before any surrender in pursu-
 ance thereof was made by the within-named [*tenant
 in tail*]. Witness my hand this — day of — 18—.

[Signature of E. F.]

FURTHER MEMORANDUM to be indorsed on last Deed.

I, the above-named E. F., do hereby testify that the within-written deed poll, and the above memorandum indorsed thereon, have been duly entered on the court rolls of the within-mentioned manor. Witness my hand this — day of — 18—. [Signature of E. F.] (a)

(a) See *ante*, p. 339, s. 51, requiring the above memoranda to be indorsed on the deed of consent.

No. IX.

SURRENDER out of Court by a Tenant in Tail in Remainder, in order to acquire a Base Fee.

MANOR OF DALE, } BE IT REMEMBERED, that on the —
IN THE }
COUNTY OF —. } day of —, in the year of our Lord
18—, A. B. of &c. came before me, —, deputy steward
of the said manor and courts thereof, and in order
well to defeat the estate tail of the said A. B. in the messuages, lands, and hereditaments hereinafter mentioned, as to acquire a base fee therein in remainder immediately expectant upon the decease of [the tenant for life] he the said A. B., under and by virtue and in pursuance of the powers and provisions for that purpose given by and contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," did out of court, according to the custom of the said manor, surrender out of his hands into the hands of the lord of the said manor, by the hands of me the said deputy steward, by the rod, in the presence and testimony of — a credible person attesting the same, All and every the messuages, lands, tenements and hereditaments whatsoever of him the said A. B. holder of the said manor by copy of court roll, with their and every of their rights, members, privileges and appurtenances, And the reversion and reversions, remainder and remainders thereof; And also all the estate, right, title, interest, use, trust, inheritance, property, claim and demand whatsoever, legal and equitable, of him the said A. B. of, in, to, or out of the same premises, every or any part thereof, with the appurtenances, To the use of the

id A. B. his heirs and assigns for ever, in remainder immediately expectant upon the decease of the said [*tenant r life*] and according to the custom of the said manor.

[*Signature of A. B.*]

aken and accepted the — day of
— 18—, by me, [*Signature of Deputy Steward.*]
Deputy Steward of the said Manor.

In the presence of [*Signature of Witness.*]

—◆—
No. X.

SURRENDER out of Court by a Tenant in Tail in Remainder with the Consent of the Protector of the Settlement, for the purpose of acquiring an Estate in Fee in Remainder.

MANOR OF DALL, } WHEREAS [*recitals of deed or will under*
IN THE }
COUNTY OF —. } which A. B. is tenant for life, with remainder to C. D. in tail, with divers remainders over—
of admission of A. B. and of protector's agreement to consent, ante, p. 608, 609.] NOW THEREFORE BE IT REMEMBERED, that on the — day of —, in the year of our Lord 18—, the said C. D. came before me —, steward of the said manor and courts thereof, and in order as well to defeat the estate tail of the said C. D. in the messuages, lands and hereditaments hereinafter mentioned, and all remainders, reversions, estates, rights, interests, and powers, to take effect after the determination or in defeasance of such estate tail as to acquire an estate of inheritance therein immediately expectant upon the decease of the said A. B., he the said C. D., under and by virtue and in pursuance of the powers and provisions for that purpose given by and contained in the said act of parliament, did out of court, according to the custom of the said manor, and with the consent of the said A. B., signified by his signature of this memorandum of surrender, in compliance with the direction for that purpose contained in the said act of parliament, surrender out of the hands of the said C. D. into the hands of the lord of the said manor, by the hands of me the said steward, by the rod, in the presence and testimony of — a credible person attesting the same, All and every the messuages, lands, tenements and hereditaments whatsoever of him the said C. D. holden of the said manor by copy of court roll, with their and every of their rights, members, privi-

leges and appurtenances, And the reversion and reversions, remainder and remainders thereof, And also all the estate, right, title, interest, use, trust, inheritance, property, claim and demand whatsoever, legal and equitable, of him the said C. D., of, in, to, or out of the same premises, every or any part thereof, with the appurtenances, To the use of the said C. D. his heirs and assigns forever, in remainder immediately expectant, and to take effect in possession on the decease of the said A. B. according to to the custom of the said manor.

A. B. [*Protector's signature.*]

C. D. [*Signature of Tenant in Tail*]

Taken and accepted the — day of —

18—, by me [*Signature of Steward.*]

Steward of the said Manor.

In the presence of [*Signature of Witness.*]

—◆—
No XI.

SURRENDER out of Court by a Married Woman, Tenant in Tail, and her Husband, to the Use of a Purchaser.

Recital of
will creating
entail.

MANOR OF DALE, } WHEREAS [*the testator*] being at the
IN THE } time of the execution of his will herein-
COUNTY OF —. } after recited, and also at his decease, seised of an estate
of inheritance, according to the custom of the said manor,
of and in the copyhold hereditaments hereinafter men-
tioned, duly made, signed and published his last will and
testament in writing, bearing date the — day of —
18—, and thereby gave and devised all and every the
messuages, lands, tenements, and hereditaments, of him
the said [*testator*] situate, lying, and being in the parish
of — in the county of —, and in any town, parish,
or place thereto next or near adjoining, unto Mary Jones,
spinster, and the heirs of her body lawfully issuing, and
in default of such issue the said [*testator*] gave and de-
vised the same hereditaments as therein mentioned; AND
WHEREAS the said [*testator*] departed this life on or about
the — day of — 18—, without having altered or
revoked his said will; AND WHEREAS at a court held in
and for the said manor on the — day of — 18—,
the said Mary Jones was admitted tenant under and by
virtue of the will of the said [*testator*] to the copyhold
hereditaments and premises so devised to her as aforesaid;

Admission of
devisee.

To hold to her the said Mary Jones and the heirs of her body, according to the form and effect of the said recited will, at the will of the lord and according to the custom of the said manor; AND WHEREAS the said Mary Jones, on the — day of — 18—, intermarried with, and is now the wife of A. B. of &c., esq.; NOW THEREFORE BE IT REMEMBERED, that on the — day of — in the year of our Lord 18—, the said A. B. and Mary his wife, copyhold tenants, or one of them, a copyhold tenant of the said manor, came before me — steward of the said manor and the courts thereof, and in order to defeat the estate tail of the said [*married woman*] in the said hereditaments, and all remainders, reversions, estates, rights, interests and powers, to take effect after the determination or in defeasance of such estate tail, (and in consideration of the sum of £— of lawful money of Great Britain to the said A. B. and Mary his wife in hand well and truly paid by [*name and description of purchaser*] in full for the absolute purchase of the said hereditaments and of the inheritance of the same in possession, according to the custom of the said manor,) they the said A. B. and Mary his wife, under and by virtue and in pursuance of the powers and provisions for that purpose given by and contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," (the said [*married woman*] being first solely and secretly examined, apart from her said husband, touching her consent to pass this surrender, and freely and voluntarily consenting thereto,) did out of court, according to the custom of the said manor, surrender out of their and each of their hands into the hands of the lord of the said manor, by the hands of me the said steward, by the rod, in the presence and testimony of —, a credible person attesting the same, All and every the messuages, lands, tenements, and hereditaments whatsoever of them the said A. B. and Mary his wife, and each of them, holden of the said manor by copy of court roll, with their and every of their rights, members, privileges, and appurtenances; And the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof; And also all the estate, right, title, interest, use, trust, property, claim, and demand whatever, legal and equitable, of them the said A. B. and Mary his wife, and each of them, of, in, to, or out of the same pre-

misses, every or any part thereof, with the appurtenances; To the only use and behoof of the said [*purchaser*], his heirs and assigns for ever, absolutely, and without any manner of condition whatsoever.

[*Signatures of Husband and Wife.*]

Taken and accepted the — day of —, 18—, (the said [*married woman*] being first solely and secretly examined, apart from her said husband, touching her consent to pass this surrender, and freely and voluntarily consenting thereto) by me,

[*Signature of Steward*],

Steward of the said manor.

In the presence of [*Signature of Witness.*]

—◆—
No. XII.

RELEASE by two Equitable Tenants in Common in Tail of Copyholds, which had been previously surrendered by an Heir at Law to a Purchaser, and Covenants for Title. (a)

Parties.

THIS INDENTURE, made the — day of —, A. D. 18—, between John Fox, of &c., eldest son and heir at law of W. Fox, late of &c., gent., deceased, by Mary his late wife, before Mary May, spinster, also deceased, of the first part; Edward Fox, of &c., the only other child of the said W. Fox, by the said Mary his wife, of the second part, and [*purchaser*] of the third part: WHEREAS [*recital of settlement, whereby freehold estates were limited to W. Fox for life, with remainder to his children by Mary his wife, as tenants in common in tail.*] And the said [*settlor*] did, by the said indenture now in recital, covenant to surrender all and singular the copyhold messuages, lands, tenements, and hereditaments, of him the said [*settlor*] holden of the manor of Dale, in the county of —; To the uses thereinbefore declared concerning the freehold hereditaments thereby granted and released, or as near thereto as the tenure of the same copyhold hereditaments would permit: AND WHEREAS no surrender of the said copyhold hereditaments has ever been made in pursuance of the

Recital of covenant to surrender copyholds to uses of a settlement.

That no surrender was made in par-

(a) This precedent is framed with reference to the statutes 3 & 4 Will. 4, c. 74, s. 53, *ante*, p. 341, and 4 & 5 Vict. c. 21, s. 3, *ante*, p. 665. See 9 Jarm. Conv. 490, note.

said recited covenant, although the same hereditaments thereby became subject in equity to the uses declared by the said recited indenture of settlement: AND WHEREAS the said [settlor] departed this life on the 6th day of May, 1830, leaving the said J. Fox and E. Fox the only children of the marriage between the said W. Fox and Mary his wife, and thereupon the said J. Fox and E. Fox became entitled under and by virtue of the limitations contained in the said recited indenture of release, to all the freehold and copyhold hereditaments thereby granted and released, and covenanted to be surrendered as aforesaid, as tenants in common in tail: AND WHEREAS at a court held in and for the said manor of Dale, on the 1st day of November, 1830, the said J. Fox was admitted tenant, as the eldest son and heir, according to the custom of the said manor, of the said [settlor], to all and singular the copyhold hereditaments hereinafter described, To hold the same to him the said J. Fox, his heirs and assigns for ever, at the will of the lord of the said manor, according to the custom of the said manor, by and under the rents, suits, and services therefore due and of right accustomed to be paid and performed: AND WHEREAS the said [purchaser] has contracted and agreed with the said J. Fox and E. Fox for the absolute purchase of the messuage or tenement, and inclosures of land hereinafter described, and the inheritance thereof in possession, according to the custom of the manor of Dale aforesaid, free from all incumbrances, at or for the price or sum of 600*l.*: AND WHEREAS, in pursuance of the said recited contract, at a court held in and for the manor of Dale aforesaid, on the day of the date, but before the sealing and delivery of these presents, the said J. Fox did surrender into the hands of the lord of the said manor, according to the custom thereof, ALL THAT, &c. [parcels], To the use of the said [purchaser], his heirs and assigns for ever, according to the custom of the said manor; and the said [purchaser] was thereupon admitted tenant to the said messuage or tenement, and inclosures of land hereinbefore described, and so surrendered to his use as aforesaid, To hold the same unto the said [purchaser], his heirs and assigns for ever, according to the custom of the said manor, by the rents and services therefore due, and of right accustomed to be paid and performed: AND WHEREAS it hath been agreed that the said J. Fox and E. Fox should execute such release and conveyance as are hereinafter contained, for the purpose of barring all equitable estates or interests in tail, and all remainders

suance of the covenant.

Death of settlor.

Admission of heir to copyhold.

Contract for purchase.

Surrender by heir to purchaser.

Agreement to bar entail and to enter into covenants.

TESTATUM.
Release by
two tenants
in common.

and reversions thereupon expectant or depending, now subsisting or capable of taking effect in the said copyhold hereditaments so surrendered to the use of the said [*purchaser*] as aforesaid, under or by virtue of the covenant contained in the said recited indenture of settlement, and that the said J. Fox and E. Fox should enter into such covenants as are hereinafter contained: Now THIS INDENTURE WITNESSETH, that in further pursuance and performance of the said recited contract, and in consideration of the sum of 300*l.* (part of the said purchase-money of 600*l.*) of lawful money of Great Britain, to the said J. Fox paid by the said [*purchaser*] at or before the sealing and delivery of these presents, and also in consideration of the sum of 300*l.* of like lawful money (residue of the said purchase money of 600*l.*) to the said E. Fox paid by the said [*purchaser*] at the same time, the several receipts of which said sums of 300*l.* and 300*l.* (making together the said sum of 600*l.*) in full, for the absolute purchase of the said messuage or tenement, and inclosures of land hereinbefore described, and the inheritance thereof, according to the custom of the said manor, the said J. Fox and E. Fox do hereby respectively acknowledge, and of and from the same sums of 300*l.* and 300*l.*, and every part thereof respectively, do and each of them doth hereby acquit, release, and discharge the said [*purchaser*], his heirs, executors, administrators and assigns for ever; and for the purpose of defeating and destroying the equitable or other estates tail of the said J. Fox and E. Fox, of and in the messuage or tenement and inclosures of land hereinbefore described, and intended to be hereby bargained and sold, and all remainders, reversions, estates, rights, interests and powers to take effect after the determination or in defeasance of such estates tail; and in order to limit and assure the inheritance in the same hereditaments, according to the custom of the said manor, unto and to the use of the said [*purchaser*], his heirs and assigns, they the said J. Fox and E. Fox, under and by virtue and in pursuance of the powers and provisions for that purpose given by or contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," HAVE and each of them HATH granted, disposed of, released, and confirmed, and by these presents made in pursuance of an act passed in the session of parliament held in the fourth

and fifth years of the reign of her Majesty Queen Victoria, intituled, "An Act for rendering a Release as effectual as the Conveyance of Freehold Estates as a Lease and release by the same Parties," do and each of them doth grant, dispose of, release, and confirm unto the said [purchaser] his heirs and assigns, the messuage or tenement and inclosures of land hereinbefore described, and to which the said [purchaser] hath been so admitted tenant as aforesaid, together with all and every the rights, members, and appurtenances thereunto belonging or appertaining, or therewith used and enjoyed; AND the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof; AND all the estate, right, title, interest, property, claim, and demand whatsoever at law or in equity, of them the said J. Fox and E. Fox, and of each of them, in, to, and out of the same hereditaments and premises, and every part thereof, TO HAVE AND TO HOLD the said messuage or tenement, inclosures of land, and all and singular other the hereditaments and premises hereby granted and released, or expressed and intended so to be, and every part thereof, with the appurtenances, unto and to the use of the said [purchaser] his heirs and assigns for ever, subject nevertheless to the rents, suits, and services therefore due and of right accustomed to be paid, rendered, and performed: AND each of them the said J. Fox and E. Fox, so far as relates to his undivided moiety or equal half part or share of and in the messuage or tenement and inclosures of land hereby granted and released, or expressed and intended so to be, and the right to assure, quiet enjoyment, freedom from incumbrances, and further assurance thereof respectively, doth hereby for himself respectively, his respective heirs, executors, and administrators, covenant and agree with the said [purchaser], his heirs and assigns, in manner following, (that is to say,) that notwithstanding any act, matter, or thing whatsoever, at any time heretofore made, done, committed, or knowingly suffered to the contrary, by them the said J. Fox and E. Fox, or either of them, or by the said [settlor], they the said J. Fox and E. Fox, or one of them, at the time of passing the said executed surrender to the use of the said [purchaser], his heirs and assigns, as aforesaid, and of the execution of these presents, have or hath or had good right, full power, and lawful and absolute authority to surrender or otherwise assure the said messuage or tenement, inclosures of land, and hereditaments hereinbefore described, with their appurtenances, to the use of the said [purchaser], his

Habendum.

Covenants
for title.

Quiet enjoyment.

Free from incumbrances.

For further assurance.

heirs and assigns for ever, in manner aforesaid, and according to the true intent and meaning of the same surrender, and of these presents: AND ALSO, that it shall be lawful for the said [purchaser], his heirs and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into and upon, and to have, hold, use, occupy, possess, and enjoy the said messuage or tenement, inclosures of land, and hereditaments hereinbefore described, and hereby granted and released, as expressed and intended so to be, and every part thereof with the appurtenances, and to receive and take the rents and profits thereof, to and for his and their own use and benefit absolutely, and without any let, suit, trouble, denial, eviction, claim or demand whatsoever of the said J. Fox and E. Fox, or either of them, their or either of their heirs or issue, or any other person or persons whomsoever, lawfully or equitably claiming, or to claim, any estate, right, title, or interest, by, from, through, under, or in trust for them or any of them, or the said [settlor] deceased: AND THAT free and clear, and freely, clearly and absolutely acquitted, released, and forever discharged, or otherwise by the said J. Fox and E. Fox, or one of them, their or one of their heirs, executors, and administrators, well and effectually saved, defended, kept harmless and indemnified from and against all former and other gifts, grants, bargains, sales, mortgages, freebench, and right and title of freebench, with debts, legacies, forfeitures, estates, titles, charges, and incumbrances, whatsoever, either already or hereafter to be made, done, committed, executed, or knowingly suffered by the said J. Fox and E. Fox, or either of them, their or either of their heirs or issue, or any person or persons claiming or to claim under them or any of them, or the said [settlor] deceased, (the rents and services due and of right accustomed to be paid and performed in respect of the said premises always excepted:) AND moreover, that they the said J. Fox and E. Fox respectively, and their respective heirs and issue, and every person having or claiming, or who shall or may at any time or times hereafter have or claim any estate, right, title, or interest at law or in equity, in, to, or out of the said messuage or tenement, inclosures of land and hereditaments hereinbefore described and expressed to be hereby granted and released, or any part thereof, by, from, through, or under them or any of them, or the said [settlor] deceased, shall and will from time to time, and at all times hereafter, at the request, costs, and charges of the said [purchaser],

purchaser], his heirs or assigns, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, surrenders, and assurances whatsoever, for the better and more effectually or satisfactorily granting, releasing, surrendering, and assuring the same hereditaments and premises, and every part thereof, with the appurtenances, To the use of the said [purchaser], his heirs and assigns for ever, according to the custom of the manor of Dale aforesaid, subject to the rents and services therefore due and of right accustomed to be paid and performed, as by the said [purchaser], his heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required. IN WITNESS, &c. (a)

MEMORANDUM to be indorsed on last Deed.

I, A. B. of &c., gentleman, steward of the within-mentioned manor of Dale, do hereby testify that the within-written indenture has been duly entered on the court rolls of the said manor. Witness my hand this — day of — 18—. [The signature of A. B.]

(a) This deed must be entered on the court rolls of the manor. (See *ante*, p. 341, a. 53.)

No. XIII.

SETTLEMENT of Real Estates by lease and release, inrolled under stat. 3 & 4 Will. 4, c. 74, by tenant for life (the Protector) and his eldest son tenant in tail in remainder, on the marriage of the son, limiting the property for securing a rent-charge to the son during the joint lives of himself and his father, a jointure rent-charge to the intended wife, and a term of years for securing the rent-charges; subject thereto, to the father for life, remainder to the son for life, remainder to trustees for a term of years, for raising portions for younger children of the marriage, remainder to the first and other sons of the intended marriage successively in tail, remainder to the daughters of the intended marriage as tenants in common in tail—POWER for intended husband to jointure future wives—POWER to grant building leases—POWER to lease at rack-rent—POWER to sell and exchange lands and to enfranchise copyholds, money arising therefrom to be invested in other lands, and in meantime upon securities—CLAUSES for the appointment and indemnity of trustees—COVENANTS for title by the father and son according to their respective interests—APPOINTMENT of Protector under the stat. 3 & 4 Will. 4, c. 74, and power to supply vacancies in the office.

Parties.

Recital of intended marriage.

THIS INDENTURE, made the — day of —, in the year of our Lord, 18—, between William Evans, of, &c. esq. [*the tenant for life*] of the first part; Edward Evans, of, &c. esq. [*the intended husband*], the eldest son and heir of the body of the said W. Evans on the second part; Jane Grace, of, &c. spinster, [*the intended wife*], of the third part; Henry How, of, &c., and Job Joy, of, &c. [*the releasees to uses and trustees for preserving contingent remainders*], of the fourth part; James King, of, &c., and Luke Lee, of, &c. [*the trustees of the term for securing rent-charges*], of the fifth part; Abel Ord, of, &c. and Peter Pope, of, &c. [*the trustees of the term for securing the younger children's portions*], of the sixth part; and A. B. and C. (hereinafter nominated protectors of the settlement intended to be hereby made) of the seventh part: WHEREAS [*recital of will creating entail, as in No. II. ante, pp. 591, 592.*] AND WHEREAS a marriage hath been agreed upon, and is intended to be shortly had and solemnized between the said E. Evans and Jane Grace, and upon the treaty for such marriage the said W. Evans and E. Evans did propose and agree, that the manors, messuages, lands, tenements, and hereditaments hereinafter described, and intended to be hereby granted and released,

with their appurtenances, should be conveyed, limited and assured to the uses, upon and for the trusts, intents and purposes, and under and subject to the powers, provisoes, declarations and agreements hereinafter limited, declared and contained, of and concerning the same: Now THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said intended marriage, and for and in consideration of the sum of 10*s.* of lawful money of Great Britain to the said W. Evans and E. Evans, paid by the said H. How and J. Joy at or immediately before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in defeating and destroying the estate tail of the said E. Evans of and in the manors, messuages, lands, tenements, and hereditaments, hereby granted and released, or expressed and intended so to be, and all remainders, reversions, estates, rights, interests, and powers to take effect by the determination or in defeasance of such estate tail, and for conveying, limiting and assuring the same remises to the uses, upon and for the trusts, intents and purposes, and under and subject to the powers, provisoes, declarations and agreements, hereinafter limited, declared, and contained, of and concerning the same, the said W. Evans, according to his estate and interest in the hereditaments hereinafter described, and also the said E. Evans, (with the consent and approbation of the said W. Evans, testified by his being a party to and sealing and delivering these presents,) under and by virtue and in pursuance of the powers and provisions for that purpose given by and contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled, "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple modes of Assurance," have and each of them hath granted, disposed of, released and confirmed, and by these presents do (a), and each of them doth grant, dispose of, release and confirm unto the said H. How and J. Joy, (in their actual possession now being, by virtue of a bargain and sale to them thereof made by the said W. Evans and E. Evans, in consideration of 5*s.* 10*pence*, by an indenture bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day next before the day

TESTATUM.
Conveyance
by tenant
for life and
tenant in tail
in remainder.

(a) If the lease for a year is not used, here refer to the stat. 4 & 5 Vict. c. 21, (see *ante*, p. 571,) and omit the words "in the actual possession," &c.

General words.

of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession,) and their heirs, All [*parcels*]. Together with all and singular houses, outhouses, edifices, buildings, barns, stables, coach-houses, cottages, dovecots, yards, gardens, orchards, backsides, tofts, lands, meadows, pastures, heaths, moors, marshes, wastes, waste grounds, folds, fold-courses, and liberty of foldage, feedings, parka, warrens, commons, common of pasture, common of turbary, mines, minerals, quarries, mills, mulctures, customs, tolls, duties, furzes, trees, woods, underwoods, coppices and the ground and soil thereof, mounds, fences, hedges, ditches, freeboards, ways, waters, watercourses, fishings, fisheries, fowlings, courts leet, courts baron and other courts, view of frankpledge, and all that to view of frankpledge doth belong, reliefs, heriots, fines, sums of money, amerciaments, goods and chattels of felons and fugitives, felons of themselves, outlawed persons, deodands, waifs, estrays, chief rents, quit rents, rents-charge, rents seck, rents of assize, fee farm rents, boons, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the said manors or lordships, messuages or tenements, farms, lands, hereditaments, and premises, belonging or in anywise appertaining, or with the same or any of them respectively now or at any time heretofore demised, leased, held, used, occupied or enjoyed, or accepted, reputed, deemed, taken or known as part, parcel, or member of them or any of them or any part of them, or appurtenant thereunto, with their and every of their appurtenances, And the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, And all the estate, right, title, interest, use, trust, property, inheritance, claim, and demand whatsoever, at law and in equity, of the said W. Evans and E. Evans, and each of them, in, to, and out of the said manors, messuages, lands and hereditaments, and every part and parcel thereof, To HAVE AND TO HOLD the said manors, messuages, lands tenements, and all and singular other the hereditaments and premises hereby granted and released, or expressed and intended so to be, with their rights, members, and appurtenances unto the said H. How and J. Joy, and their heirs, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter limited, expressed, declared, and contained, of and concerning the same, (that is to say,) To the uses to which the same premises were and stood

Reversion,
&c.All the estate,
&c.

Habendum.

uted immediately before the sealing and delivery of
 the presents in the meantime and until the solemniza-
 tion of the said intended marriage, and from and imme-
 diately after the solemnization thereof, as to all and
 singular the said manors, messuages, lands, tenements,
 hereditaments, and premises, with their rights, members,
 and appurtenances, To the use, intent, and purpose, that
 the said E. Evans and his assigns shall and may yearly
 receive, and take, during the joint lives of himself
 and the said W. Evans, one annual sum or yearly rent
 charge of 800*l.* of lawful money of Great Britain, to be
 chargeable upon and yearly issuing and payable out of
 the said manors, messuages, lands, hereditaments, and
 premises, hereby granted and released, or expressed and
 intended so to be, and to be paid quarterly, at or in the
 common dining hall of Lincoln's Inn, in the county of
 Middlesex, by equal quarterly payments on the four
 next usual days of payment in the year, (that is to say,)

 the 25th day of March, the 24th day of June, the 29th
 day of September, and the 25th day of December, in
 every year, without any deduction or abatement whatso-
 ever on account or in respect of any taxes, charges, im-
 positions, or assessments, already taxed, charged, assessed,
 or imposed, or to be hereafter taxed, charged, assessed,
 or imposed on the said manors, messuages, lands, here-
 ditaments and premises, or on the said annual sum or
 yearly rent charge of 800*l.* or on the said E. Evans or his
 assigns in respect thereof, by authority of parliament or
 otherwise howsoever, and the first quarterly payment
 thereof to be made on such of the said days as shall first
 happen after the solemnization of the said intended mar-
 riage; AND to and for this further use, intent, and pur-
 pose, that in case, and when and so often as the said an-
 nual sum or yearly rent charge of 800*l.* hereinbefore
 limited, or any part thereof, shall at any time or times be
 unpaid by the space of twenty-one days next after any of
 the days hereby appointed for the payment thereof as
 aforesaid, then and so often it shall be lawful to and for
 the said E. Evans and his assigns, during the joint lives
 of himself and the said W. Evans, to enter into and dis-
 train upon the said manors, messuages, lands heredita-
 ments, and premises hereby granted and released, or any
 part thereof, and to dispose of the distress or distresses
 then and there found according to law, as in cases of
 distress taken for rent reserved on common demises or
 leases for years, to the intent that thereby or otherwise
 the said E. Evans and his assigns shall and may be fully
 paid and satisfied the said annual sum or yearly rent

Limitation of
 rent charge
 to son during
 joint lives of
 himself and
 father.

Power of dis-
 train.

Power of
entry.

Limitation
of jointure
to intended
wife.

charge of 800*l.* hereby limited, and every part thereof as in arrear and unpaid, and all costs, charges, and expenses occasioned by reason of the nonpayment thereof; And to and for this further use, intent, and purpose, that in case the said annual sum or yearly rent charge of 800*l.* hereby limited, or any part thereof, shall at any time or times be unpaid by the space of forty days next after any of the days appointed for the payment thereof, then and so often, although there shall not have been any legal demand made thereof, it shall be lawful to and for the said E. Evans and his assigns, during the joint lives of himself and the said W. Evans, to enter into and upon and hold the said manors, messuages, lands, hereditaments, and premises, hereby granted and released, or any part thereof, and to receive and take the rents, issues, and profits thereof, to his and their own use, until he or they shall thereby, therewith, or otherwise, be fully paid and satisfied the said annual sum or yearly rent charge of 800*l.* hereby limited, and the arrears thereof due at the time of such entry or afterwards to become due, during his and their being in possession of the said premises, together with all costs, charges, and expenses, which he or they shall incur, sustain, or be put unto for recovering and enforcing payment of the same, and such possession, when taken, to be without impeachment of waste, and subject and charged as hereinbefore is mentioned, To this further use, intent, and purpose, that the said Jane Grace, (in case she shall survive the said E. Evans, her intended husband,) and her assigns, shall and may after the decease of the said E. Evans, yearly and every year during the then remainder of her natural life, have, receive, and take, for her jointure, and in lieu, bar, and satisfaction of the dower or thirds and freebench at common law (*b*), or by custom or otherwise, which she might otherwise have, claim, or demand, in, to, and out of all or any lands or hereditaments, in England or elsewhere, of which the said E. Evans now is or shall, during the said intended coverture, be seised for any estate of inheritance, or for any other estate to which dower or freebench is incident, one annual sum or yearly rent charge of 500*l.* of lawful money of Great Britain, to be chargeable upon and yearly issuing and payable out of the said manors, messuages, lands, hereditaments, and premises, hereby granted and released,

(*b*) A rent-charge expressed to be for a jointure and in lieu of dower and thirds at common law, does not bar the jointress of her share in her husband's undisposed of personal estate. *Colleton v. Garth*, 6 Sim. 19.

to be paid quarterly at or in the common dining hall Lincoln's Inn, in the county of Middlesex, by equal quarterly payments on the days hereinbefore mentioned every year, without any deduction or abatement whatever on account or in respect of any taxes, charges, impositions, or assessments already taxed, charged, assessed, imposed, or to be hereafter, taxed, charged, assessed, imposed on the said manors, messuages, lands, herements, and premises, or on the said annual sum or yearly rent charge of 500*l.*, or on the said Jane Grace, or assigns, in respect thereof, by authority of parliament otherwise howsoever (except for or on account of the rent or any future tax upon property or income), and

first quarterly payment thereof to be made on such the said days of payment as shall happen next after the decease of the said E. Evans: And to and for this other use, intent, and purpose, that in case the said annual sum or yearly rent charge of 500*l.*, or any part thereof, shall be unpaid by the space of twenty-one days after any of the days appointed for payment thereof aforesaid, then and so often as the same shall happen, the said J. Grace and her assigns shall and may for recovery thereof, and of all costs and damages occasioned by the nonpayment thereof, have and enjoy such and the like power of distraining upon all or any of the manors, messuages, lands, and hereditaments hereby charged with the payment of the same, as is hereinbefore given to the said E. Evans for the recovery of the said annual sum or yearly rent charge of 800*l.*; and also in case the said annual sum or yearly rent charge of 500*l.* shall be in arrear or unpaid by the space of forty days after any of the days appointed for payment of the same, the said J. Grace and her assigns shall and may, for compelling payment and obtaining satisfaction for the same, together with all such costs and damages as aforesaid, have and enjoy such and the like power of distraining upon and detaining possession of all or any of the said manors, messuages, lands, and hereditaments charged with the payment thereof as hereinbefore is given to the said E. Evans and his assigns, for enabling them and them to recover payment and obtain satisfaction and for the said annual sum or yearly rent charge of 500*l.* hereinbefore limited; and subject and charged as hereinbefore is mentioned, To the use of the said J. King and L. Lee, their executors, administrators, and assigns, and during the term of two hundred years, to commence and be computed from the day of the date of these

Powers of
distrain and
entry by re-
ference.

Term of two
hundred years
limited to
trustees.

presents, and fully to be complete and ended, without impeachment of waste, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisos, agreements, and declarations hereinafter expressed and contained of or concerning the same; and from and after the expiration or sooner determination of the said term of two hundred years, and in the meantime subject thereto and to the trusts thereof, To the use of the said W. Evans and his assigns for and during the term of his natural life, without impeachment of or for any manner of waste, and from and after any determination of that estate, by forfeiture or otherwise, in the lifetime of the said W. Evans, To the Use of the said H. How and J. Joy and their heirs during the natural life of the said W. Evans upon trust to preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions, as occasion shall require; but, nevertheless, to permit and suffer the said W. Evans and his assigns to receive and take the rents, issues, and profits of the said premises to his and their own use during the term of his natural life; and immediately from and after the decease of the said W. Evans, To the Use of the said E. Evans and his assigns for and during the term of his natural life, without impeachment of or for any manner of waste; and from and after the determination of that estate by forfeiture or otherwise, in the lifetime of the said E. Evans, To the Use of the said H. How and J. Joy and their heirs during the natural life of the said E. Evans, upon trust, to preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require; but, nevertheless, to permit and suffer the said E. Evans and his assigns to receive and take the rents, issues, and profits of the said premises to his and their own use during the term of his natural life; and immediately from and after the decease of the said E. Evans, To the Use of the said A. Ord and P. Pope, their executors, administrators and assigns, for and during the full term of one thousand years, to be computed from the day of the date of these presents, and fully to be complete and ended, without impeachment of waste, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisos, agreements, and declarations hereinafter expressed and contained of and concerning the same; and immediately from and after the expiration or sooner determination of the said term of one thousand years, and in the meantime subject thereto and to the trusts thereof,

Remainder to father for life.

Remainder to trustees, to support contingent remainders.

Remainder to son for life.

Remainder to trustees to support, &c.

Remainder to trustees for term of one thousand years.

to the Use of the first and every other son of the said E. Evans on the body of the said J. Grace lawfully to be gotten, severally, successively, and in remainder, one after another, in order and course as they shall respectively be in priority of birth, and the heirs male of the body and respective bodies of all and every such sons and in issuing, the elder of such sons and the heirs male of his body being always to take before and be preferred to the younger of such sons and the heirs male of his and their body and respective bodies issuing; and in default of such issue, To the Use of all and every the daughters and daughter of the said E. Evans on the body of the said J. Grace, his intended wife, to be begotten, equally to be divided between or amongst them share and share alike, as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of all and every such daughters and daughter lawfully issuing; and in case there shall be a failure of issue of any one or more such daughters, then as well as to the original share or shares of, as the share or shares surviving or accruing to such last-mentioned daughter or daughters, or her or their issue, To the Use of all and every other daughters and daughter of the said E. Evans on the body of the said J. Grace to be begotten, equally to be divided between or amongst them, if more than one, share and share alike, as tenants in common and not as joint tenants, and of the several and respective heirs of their bodies issuing; and in case all such daughters but one shall happen to be without issue, or if there shall be but one such daughter, then to the use of such one daughter and the heirs of her body lawfully issuing, and for default of such issue, to the Use of the said E. Evans, his heirs and assigns forever: And it is hereby agreed and declared between and by the parties to these presents, that the said manors, messuages, lands, and other hereditaments hereinbefore granted and released, or expressed and intended so to be, are hereby limited to the said J. King and L. Lee, their executors, administrators, and assigns, for the said term of two hundred years, upon trust for the further and better securing the payment of the said several sums or yearly rent charges of 800*l.* and 500*l.* hereinbefore respectively limited as aforesaid, at the days and times and in the manner hereinbefore mentioned and appointed for payment thereof respectively, without any deduction or abatement as aforesaid, for which end it is hereby agreed and declared between and by the said parties to these presents, that the said J. King and L. Lee, their execu-

Remainder to first and other sons of marriage in tail.

Remainder to daughters of marriage as tenants in common in tail, with cross remainders.

Trusts of the term of two hundred years declared for securing the rent charges.

tors, administrators, and assigns, shall and do permit and suffer the person and persons to whom the immediate remainder or reversion of the said manors, messuages, lands, hereditaments and premises comprised in the said term of two hundred years, expectant upon the determination thereof, shall for the time being belong, according to the limitations aforesaid, to receive and take the rents, issues, and profits of the same premises, until default shall happen to be made of or in payment of the said annual sums or yearly rent charges of 800*l.* and 500*l.* hereinbefore respectively limited, or either of them, or some part thereof respectively, at the times and in the manner hereinbefore appointed for payment of the same respectively; and that in case the same annual sums or yearly rent charges of 800*l.* and 500*l.* or either of them, or any part thereof respectively, shall happen to be behind & unpaid by the space of forty days next after any one of the said days whereon the same respectively are hereinbefore directed to be paid, then and in such case and so often as the same shall happen, the said J. King and L. Lee, or the survivor of them, or the executors, administrators, or assigns of such survivor, do and shall, from time to time, by and out of the rents, issues, and profits of the said manors, messuages, lands, hereditaments and premises comprised in the said term of two hundred years, or by demising, leasing, or mortgaging the same premises or any part thereof, for all or any part of the said term, or by bringing actions against the tenants or occupiers of the same premises for recovery of the rents and profits, or by such other reasonable ways or means as the said J. King and L. Lee, or the survivor of them, or the executors, administrators, or assigns of such survivor shall seem meet, levy, raise, and pay the said annual sums or yearly rent charges of 800*l.* and 500*l.* hereinbefore respectively limited, or such of them as shall be so in arrear, and all arrears thereof respectively which shall be then due and unpaid, or which shall afterwards, during their continuance in possession, accrue of the same, and all costs, damages, and expenses which the said E. Evans and J. Grace, or either of them, their or either of their executors, administrators or assigns, or the said J. King and L. Lee, or either of them, their or either of their executors, administrators or assigns, or any of them, shall be put unto or sustain by reason of the non-payment thereof, or the recovering or obtaining payment thereof or otherwise relating thereto, and do and shall pay the surplus (if any) of the monies to be raised by the ways and means aforesaid, to the person

persons next in remainder or reversion for the time being, immediately expectant upon the determination of the said term of two hundred years, according to the limitations aforesaid: PROVIDED ALWAYS and it is hereby agreed and declared between and by the parties to these presents, that from and immediately after all the trusts hereinbefore declared of and concerning the said term of two hundred years, shall in all respects be fully performed and satisfied, or shall become unnecessary or incapable of taking effect, and the said J. King and L. Lee, and each of them, their and each of their executors, administrators, and assigns, shall be fully reimbursed and satisfied all costs, damages, and expenses (if any), to be occasioned by or relating to the trusts hereby reposed in them as aforesaid, and which they are hereby respectively authorized and empowered to levy and raise by all or any of the ways and means aforesaid, and to retain accordingly, the said term of two hundred years shall, (subject and without prejudice to any disposition which shall have been made of the premises comprised therein, or any of them, or any part thereof, for the purposes aforesaid) absolutely cease and determine: AND IT IS HEREBY AGREED and declared between and by the said parties to these presents, that the said manors, messuages, lands, and other hereditaments, are hereby limited to the said L. Ord and P. Pope, their executors, administrators and assigns, for the said term of 1000 years, upon and for the trusts, intents and purposes, and with, under, and subject to the powers, provisos, agreements, and declarations hereinafter expressed and declared of and concerning the same, (that is to say,) Upon Trust, in case there shall be any child or children of the said E. Evans on the body of the said J. Grace lawfully to be begotten (other than a son not being an eldest or only son for the time being entitled under the limitations hereinbefore contained, to be said manors, messuages, lands, and other hereditaments, for an estate tail in possession or in remainder immediately expectant upon the decease of the said E. Evans,) then and in such case the said A. Ord and P. Pope, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall, either in the life-time of the said E. Evans, with his consent in writing, or else not till after his decease, (but subject and without prejudice to the raising and paying of the said yearly rent charge or sum of 500*l.* hereinbefore limited in use to the said J. Grace for her life, and to such powers and remedies for recovering the same as aforesaid,) by mortgaging, selling, or otherwise disposing of

Proviso for
cesser of this
term.

Trusts de-
clared of the
term of 1000
years.

To raise por-
tions for
younger chil-
dren of the
marriage.

the said manors, messuages, lands and other hereditaments, or any of them, or any part thereof, for the whole or any part of the said term of 1000 years, or by or with and out of the rents, issues, and profits of the same manors, messuages, lands and other hereditaments, or any of them, or by bringing actions against the tenants or occupiers of the same premises, or any of them, for the rents then in arrear, or by more than one, or by all of the aforesaid ways and means, or by any other reasonable ways or means, levy and raise for the portion & portions of such child or children (other than and not being any of them an eldest or only son so for the time being entitled as aforesaid) the sum or sums of money hereinafter mentioned, (that is to say,) if there shall be but one such child, not being an eldest or only son so for the time being entitled as aforesaid, the sum of 4000*l.* of lawful money of Great Britain, for the portion of such one child, to become an interest vested in and to be paid to such one child, whether a son or a daughter, on or at such age, day, or time as the said E. Evans by any deed or writing, with or without power of revocation and new appointment, to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed in the presence of and attested by two or more credible witnesses, shall direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment shall not extend to be an interest vested in such child, being a younger son, at his age of twenty-one years, or being a daughter at her age of twenty-one years or day of marriage, which shall first happen, and to be paid to him or her on or at the same age or time, if the same shall happen after the decease of the said E. Evans; but if the same shall happen in the life-time of the said E. Evans, then immediately after the decease of the said E. Evans, unless he shall signify his consent in writing under his hand and seal, that the same shall be raised and paid in his lifetime; and if there shall be two children of the said E. Evans on the body of the said J. Grace lawfully begotten, and no more, (other than and not being an eldest or only son so for the time being entitled as aforesaid) then the sum of 6000*l.* of like lawful money, for the portions of such two children; and if there shall be three or more children of the said E. Evans by the said J. Grace, (other than and not being an eldest or only son so for the time being entitled as aforesaid)

If one child,
4000*l.*

To be vested
and paid as
intended hus-
band shall by
deed or will
appoint.

In default of
appointment,
to be vested
in son at
twenty-one,
or daughter
at twenty-one
or marriage.

If two
younger
children,
6000*l.*

If three or
more younger
children,
10,000*l.*

then the sum of 10,000*l.* of like lawful money, for the portions of such three or more children; the said sum of 3000*l.* or 10,000*l.*, as the event shall happen, to be shared and divided between or amongst the children respectively entitled thereto, in such parts, shares and proportions, and to be interests vested in and to be paid to them respectively on or at such ages, days, or times, and to be subject to such annual sum and sums of money and limitations over for the benefit of some one or more such child or children, (other than and not being an eldest or only son so for the time being entitled as aforesaid,) as the said E. Evans by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed in the presence of and attested by two or more credible witnesses, shall from time to time direct or appoint; and in default of such direction or appointment, or so far as any such direction or appointment shall not extend, the said sum of 6000*l.* or 10,000*l.* (as the event shall happen,) to be paid to and divided between or among the children entitled thereto respectively, in equal shares and proportions, the share or shares of such of them as shall be a son or sons to be an interest vested or interests vested in him or them respectively at his or their age or respective ages of twenty-one years; and the share or shares of such of them as shall be a daughter or daughters to be an interest vested or interests vested in her or them respectively at her or their age or respective ages of twenty-one years or day or respective days of marriage, which shall first happen, and to be paid to him, her, or them respectively on or at the same ages, days, or times respectively, if the same respectively shall happen after the decease of the said E. Evans; but if the same respectively shall happen in the life-time of the said E. Evans, then immediately after the decease of the said E. Evans, unless he shall signify his consent in writing under his hand and seal that the same, or any of them, shall be raised and paid in his life time: PROVIDED ALWAYS and it is hereby agreed and declared between and by the parties to these presents, that in default of any such direction or appointment as aforesaid to the contrary, no child or children taking any part of the sum of 6000*l.* or 10,000*l.* (as the event shall happen) under or by virtue of any direction or appointment to be made by the said E. Evans

Such sums to be paid as intended husband shall by deed or will appoint.

In default of appointment, to sons at twenty-one, and to daughters at twenty-one or marriage.

Appointed shares to be brought into hotchpot.

Classes of survivorship and accretion.

in pursuance of the power or authority hereinbefore given to him for that purpose, shall have or be entitled to any further or other share of or in that part of the said sum of 6000*l.* or 10,000*l.* (as the event shall happen,) of which no such direction or appointment shall be made, without bringing his, her, or their appointed share or shares into hotchpot, and accounting for the same accordingly: PROVIDED ALSO, and it is hereby further agreed and declared between and by the parties to these presents, that if there shall be more than one such child for whom portions are intended to be hereby provided as aforesaid, and any of them being a son or sons, shall depart this life or become an eldest or only son so for the time being entitled as aforesaid, under the age of twenty-one years, or being a daughter or daughters, shall depart this life under the age of twenty-one years and without being or having been married, then and in case no such direction or appointment as aforesaid shall be made by the said E. Evans to the contrary, as well the share intended to be hereby originally provided for, as the share or shares by virtue of this present clause or proviso surviving or accruing to each such son so dying or becoming an eldest or only son so for the time being entitled as aforesaid, and each such daughter so dying as aforesaid, or so much thereof as shall not have been raised or paid or applied for the preferment and advancement in the world of any such son or sons, by virtue and in pursuance of the power or authority hereinbefore in that behalf contained, shall go, accrue, and belong to the survivor or survivors, others or other, of such children (not being an eldest or only son so for the time being entitled as aforesaid,) and shall vest in and be paid to him, her, or them (if more than one,) in equal parts, shares, and proportions, at such and the same time or times, and in such and the same manner as hereinbefore declared and expressed touching and concerning his, her or their original portion or portions, or as near thereto as circumstances will admit; but so nevertheless that no one child shall by survivorship or otherwise have or be entitled to more than the sum of 5000*l.* for his or her portion, nor any two children to more than the sum of 6000*l.* between them for their portions: AND UPON THIS FURTHER TRUST, that they the said A. Ord and P. Pope, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall after the decease of the said E. Evans, (subject and without prejudice as aforesaid,) by and out of the rents, issues, and profits of the said manors, messuages, lands, and other hereditaments comprised in

Provision for maintenance.

the said term of 1000 years, or any part or parts thereof, to pay and raise for the maintenance and education of the said child or children for the time being of the said E. Evans and J. Grace, for whom a portion or portions is or are intended to be hereby provided as aforesaid, in the meantime and until his, her, or their portion or respective portions shall become payable, such yearly sum or sums of money, not exceeding what the interest of the expectant portion or portions intended to be hereby provided for each child or children respectively, would amount to after the rate of 5*l.* for every 100*l.* by the year, as the said E. Evans by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed in the presence of and attested by two or more credible witnesses, shall from time to time direct and appoint; and in default of any such direction or appointment, and so far as any such direction or appointment shall not extend, such yearly sum or sums of money as the said A. Ord and P. Pope, or the survivor of them, or the executors, administrators or assigns of such survivor, shall for that purpose deem sufficient and proper, not exceeding the amount of such interest as aforesaid, the said yearly sum or sums of money for maintenance, to be free and clear of and from all deductions for taxes or otherwise, and to be raised and paid in such manner and at such times as to them the said A. Ord and P. Pope, or the survivor of them, or the executors, administrators, or assigns of such survivor, shall in that behalf seem meet: PROVIDED ALWAYS and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said A. Ord and P. Pope, and the survivor of them, and the executors, administrators and assigns of such survivor, at any time or times during the life of the said E. Evans, with his consent and approbation, signified by any deed or deeds, instrument or instruments in writing, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses; and after his decease, then of the proper authority of the said A. Ord and P. Pope, or the survivor of them, or the executors, administrators and assigns of such survivor, to levy and raise by the ways and means aforesaid, or any of them, for the advancement or preferment in the world of any son or sons of the said E. Evans on the body of the said J. Grace lawfully to be begotten, (other than and not

Power to
raise money
for advance-
ment of
younger
sons.

Clause of survivorship and accrue.

in pursuance of the power or authority hereinbefore given to him for that purpose, shall have or be entitled to any further or other share of or in that part of the said sum of 6000*l.* or 10,000*l.* (as the event shall happen,) of which no such direction or appointment shall be made, without bringing his, her, or their appointed share or shares into hotchpot, and accounting for the same accordingly: **PROVIDED ALSO**, and it is hereby further agreed and declared between and by the parties to these presents, that if there shall be more than one such child for whom portions are intended to be hereby provided as aforesaid, and any of them being a son or sons, shall depart this life or become an eldest or only son so for the time being entitled as aforesaid, under the age of twenty-one years, or being a daughter or daughters, shall depart this life under the age of twenty-one years and without being or having been married, then and in case no such direction or appointment as aforesaid shall be made by the said E. Evans to the contrary, as well the share intended to be hereby originally provided for, as the share or shares by virtue of this present clause or proviso surviving or accruing to each such son so dying or becoming an eldest or only son so for the time being entitled as aforesaid, and each such daughter so dying as aforesaid, or so much thereof as shall not have been raised or paid or applied for the preferment and advancement in the world of any such son or sons, by virtue and in pursuance of the power or authority herein-after in that behalf contained, shall go, accrue, and belong to the survivor or survivors, others or other, of such children (not being an eldest or only son so for the time being entitled as aforesaid,) and shall vest in and be paid to him, her, or them (if more than one,) in equal parts, shares, and proportions, at such and the same time or times, and in such and the same manner as hereinbefore declared and expressed touching and concerning his, her or their original portion or portions, or as near thereto as circumstances will admit; but so nevertheless that no one child shall by survivorship or otherwise have or be entitled to more than the sum of 5000*l.* for his or her portion, nor any two children to more than the sum of 6000*l.* between them for their portions: **AND UPON THIS FURTHER TRUST**, that they the said A. Ord and P. Pope, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall after the decease of the said E. Evans, (subject and without prejudice as aforesaid,) by and out of the rents, issues, and profits of the said manors, messuages, lands, and other hereditaments comprised in

Provision for maintenance.

ion or portions intended to be hereby provided for such child or children severally as aforesaid, the same shall be accounted in full satisfaction of the whole of such his, her, or their portion or portions; but if such advanced sum or sums of money shall be less than such portion or portions, the same shall be considered as part only of such his, her, or their portion or portions, and such money may shall be raised under or by virtue of the trusts of the said term of 1000 years, for the portion or portions of the child or children to or with whom such sum or sums of money shall be so given or advanced by the said E. Evans, together with the sum or sums of money so to be given or advanced, will amount to and complete the sum of money intended to be hereby provided for such child or children respectively, under or by virtue of the trusts of the said term of 1000 years; and then and in such case the said E. Evans, his executors, administrators or assigns, shall be entitled to receive the sum or sums of money so to be advanced by him as aforesaid, and the same shall be considered as part of his personal estate, unless the said E. Evans shall by some writing under his hand direct the contrary: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that from and immediately after all the trusts hereinbefore declared of and concerning the said term of 1000 years shall in all respects be fully performed and satisfied, or shall become unnecessary, or incapable of taking effect, and the said A. Ord and P. Pope, and each of them, their and each of their executors, administrators and assigns, shall be fully reimbursed and satisfied all costs, charges and expenses, (if any,) to be occasioned by or relating to the trusts hereby reposed in them as aforesaid, and which they are hereby respectively authorized and empowered to levy and raise by all or any of the ways and means aforesaid, and to retain accordingly, the same term shall as to such of the said manors, messuages, lands, and other hereditaments comprised therein, as shall not have been sold or mortgaged for the purposes aforesaid, absolutely cease and determine; and as to such of the hereditaments as shall have been mortgaged for the purposes aforesaid, shall, subject to such mortgage or mortgages, wait upon and attend the freehold and inheritance of the hereditaments so mortgaged: PROVIDED ALSO, and it is hereby further agreed and declared between and by the parties to these presents, that in case the said J. Grace shall die in the lifetime of the said E. Evans, it shall and may be lawful to and for the said E. Evans, at any time or times

Proviso for
cessor of this
term.

Power for
intended
husband to
create joint-
ures for after
taken wives.

being an eldest or only son so for the time being entitled as aforesaid,) any sum or sums of money, not exceeding in the whole for any one such son one moiety or equal half part or share of his expectant portion under the trusts hereinbefore declared, (which same sum or sums of money shall be considered and taken to be in part of the portion or fortune provided or intended to be provided for such son or sons under or by virtue of the trusts of the said term of 1000 years,) and to pay and apply the money so to be raised for the placing out, preferment, advancement or benefit of such son or sons as the said E. Evans shall during his life think fit, or as after his decease they the said A. Ord and P. Pope, or the survivor of them, or the executors, administrators or assigns of such survivor, shall in their or his discretion think fit, notwithstanding the portion or portions of such son or sons shall not then have become vested or payable: PROVIDED ALWAYS, and it is hereby further agreed and declared between and by the parties to these presents, that the said A. Ord and P. Pope, or the survivor of them, or the executors, administrators or assigns of such survivor, shall not sell, mortgage or demise any part or parts of the said manors, messuages, lands and other hereditaments comprised in the said term of 1000 years, until one of the said portions or some part thereof shall become payable by virtue of and under the trusts or powers aforesaid, except for the purpose of such advancement as aforesaid, and that the rents, issues and profits of the said manors, messuages, lands, and other hereditaments, or so much of the same rents, issues and profits as shall remain, after answering the trusts aforesaid, shall, until one such portion shall become payable as aforesaid, be had and received by the person or persons who for the time being shall be entitled to the same manors, messuages, lands, and other hereditaments in reversion or remainder expectant on the determination of the same term, to and for his and their own use and benefit: PROVIDED ALSO, and it is hereby further agreed and declared between and by the parties to these presents, that if the said E. Evans shall during his life give and advance to or with any child or children for whom a portion or portion is or are intended to be hereby provided as aforesaid, any sum or sums of money for or towards his, her, or their preferment or advancement in the world, then and in such case, (unless the said E. Evans shall by some writing under his hand direct the contrary,) if such advanced sum or sums of money shall be equal to the whole of the por-

No sale or mortgage to be made until a portion is payable.

Surplus rents to be received by persons entitled, subject to the term.

Money advanced by husband to be considered as part of portion.

on or portions intended to be hereby provided for such
 child or children severally as aforesaid, the same shall be
 accounted in full satisfaction of the whole of such his,
 her, or their portion or portions; but if such advanced
 sum or sums of money shall be less than such portion or
 portions, the same shall be considered as part only of such
 his, her, or their portion or portions, and such money
 shall be raised under or by virtue of the trusts of the
 said term of 1000 years, for the portion or portions of the
 child or children to or with whom such sum or sums of
 money shall be so given or advanced by the said E. Evans,
 together with the sum or sums of money so to be given
 or advanced, will amount to and complete the sum of
 money intended to be hereby provided for such child or
 children respectively, under or by virtue of the trusts of
 the said term of 1000 years; and then and in such case
 the said E. Evans, his executors, administrators or assigns,
 shall be entitled to receive the sum or sums of money so
 to be advanced by him as aforesaid, and the same shall
 be considered as part of his personal estate, unless the said
 E. Evans shall by some writing under his hand direct the
 contrary: PROVIDED ALWAYS, and it is hereby agreed and
 declared between and by the parties to these presents,
 that from and immediately after all the trusts hereinbefore
 declared of and concerning the said term of 1000 years
 shall in all respects be fully performed and satisfied, or
 shall become unnecessary, or incapable of taking effect,
 and the said A. Ord and P. Pope, and each of them,
 their and each of their executors, administrators and
 assigns, shall be fully reimbursed and satisfied all costs,
 charges and expenses, (if any,) to be occasioned by or
 relating to the trusts hereby reposed in them as aforesaid,
 and which they are hereby respectively authorized and
 empowered to levy and raise by all or any of the ways
 and means aforesaid, and to retain accordingly, the same
 term shall as to such of the said manors, messuages, lands,
 and other hereditaments comprised therein, as shall not
 have been sold or mortgaged for the purposes aforesaid, ab-
 solutely cease and determine; and as to such of the heredi-
 taments as shall have been mortgaged for the purposes aforesaid,
 shall, subject to such mortgage or mortgages, wait upon
 and attend the freehold and inheritance of the heredita-
 ments so mortgaged: PROVIDED ALSO, and it is hereby
 further agreed and declared between and by the parties
 to these presents, that in case the said J. Grace shall die
 in the lifetime of the said E. Evans, it shall and may be
 lawful to and for the said E. Evans, at any time or times

Provision for
 ceasing of this
 term.

Power for
 intended
 husband to
 create joint-
 tures for after
 taken wives.

after the decease of the said J. Grace, either before or after his intermarriage with any other woman or women, by any deed or deeds, instrument or instruments in writing, to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed in the presence of and attested by two or more credible witnesses, to grant, limit, or appoint to or to the use of any woman or women respectively, whom he the said E. Evans shall marry after the decease of the said J. Grace, for her or their life or respective lives, and in full or in part of her or their jointure or jointures, and either in bar or without being in bar of dower, any annual sum or sums, yearly rent charge or rent charges, not exceeding in the whole for any one such woman the yearly sum of 400*l.* of lawful money of Great Britain, without any deduction, to take effect immediately after the death of him the said E. Evans, such annual sum or sums or yearly rent charge or rent charges to be payable quarterly, and to be issuing out of and chargeable upon all or any part or parts of the said manors, messuages, lands and other hereditaments hereby granted and released, or expressed and intended so to be, and for the purpose of securing the annual sum or sums, yearly rent charge or rent charges, so to be appointed as aforesaid, to grant, limit and appoint to the woman or women respectively to whom the said annual sum or sums, yearly rent charge or rent charges, shall be appointed as aforesaid, usual powers and remedies for recovering and enforcing payment thereof respectively, by distress and entry upon and perception of the rents and profits of the hereditaments so to be charged with the said annual sum or sums, or yearly rent charge or rent charges; and also to limit and appoint the hereditaments so to be charged as aforesaid to any person or persons whomsoever, for any term or terms of years, upon the usual trusts for better securing the due payment thereof, to take effect immediately after the decease of the said E. Evans, as to the said E. Evans shall seem meet; but so that every such term or terms of years (if any such shall be limited) be made to determine on the death of the woman or women for the benefit of whom the same shall be created, and the payment of the arrears of her or their rent charge or respective rent charges, and the expenses incurred by the non-payment thereof respectively: PROVIDED ALSO, and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the

Power for
tenants for
life and trusts,
durlug

said W. Evans and E. Evans, as and when, by virtue of the limitations hereinbefore contained, they shall successively and respectively be in the actual possession of or entitled to the receipt of the rents, issues and profits of the said manors, messuages, lands, and other hereditaments hereinbefore granted and released, or expressed or intended so to be, during their respective lives; and also to and for the said H. How and J. Joy, and the survivor of them, and the executors or administrators of such survivor, from time to time and at all times during the minority or respective minorities of any child or children who by virtue of the limitations aforesaid shall for the time being be entitled to the actual possession, or the receipt of the rents, issues, and profits of the same hereditaments and premises, by any indenture or indentures to be sealed and delivered by them respectively in the presence of and attested by two or more credible witnesses, to limit or appoint, by way of demise or lease, all or any part of the said messuages, lands, and other hereditaments hereby granted and released, or expressed and intended so to be, to any person or persons who shall improve the same, or covenant and agree to improve the same, by erecting or building thereon any new house or houses, erections or buildings, or to rebuild or repair any of the messuages, tenements, erections and buildings whatsoever, which now are or hereafter shall be on the same hereditaments, or any part thereof, or to expend such sums of money in improvements thereof respectively as shall be thought adequate for the interests therein respectively to be parted with, for any term or number of years not exceeding ninety-nine years, to take effect either in possession or immediately after the determination of the subsisting leases for the time being of the same hereditaments, so that in every such limitation or appointment by way of demise or lease, there be reserved the best and most improved yearly rent or rents to be payable during the continuance of the use or estate, uses or estates, created thereby, and to be incident to the immediate reversion of the hereditaments so to be limited or appointed by way of demise or lease as aforesaid, that can be reasonably had or gotten for the same, without taking any fine, premium, or foregift for the making thereof, and so that no such limitation or appointment by way of demise or lease as aforesaid shall be valid in law unless there be inserted therein a clause in the nature of a condition of re-entry on non-payment of the rent or rents thereby to be respectively reserved, and so as the appointee or

minority of children, to grant building leases.

Power of
leasing at
rack rent.

appointees, lessee or lessees, do execute a counterpart thereof respectively, and do thereby covenant for the due payment of the rent or rents thereby to be respectively reserved: PROVIDED ALSO, and it is hereby further agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said W. Evans and E. Evans, as and when, by virtue of the limitations hereinbefore contained, they shall successively and respectively be in the actual possession of and entitled to the receipt of the rents, issues, and profits of the said manors, messuages, lands, and other hereditaments hereby granted and released, or expressed and intended so to be, during their respective lives, and also to and for the said H. How and J. Joy, and the survivor of them, and the executors or administrators of such survivor, from time to time and at all times during the minority or respective minorities of any child or children who by virtue of any of the limitations aforesaid shall be entitled to any estate of freehold and inheritance of and in the said manors, messuages, lands, hereditaments, and premises, by any indenture or indentures to be sealed and delivered by them respectively in the presence of and attested by two or more credible witnesses, to limit or appoint, by way of demise or lease, all or any part or parts of the said manors, messuages, lands, and other hereditaments, with the appurtenances, to any person or persons, for any term or number of years absolute, not exceeding twenty-one years, to take effect in possession and not in reversion or by way of future interest, so as there shall be reserved on every such limitation or appointment by way of demise or lease the best or most improved yearly rent or rents, to be incident to the immediate reversion of the hereditaments so to be limited or appointed, that can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift, or any thing in the nature of a fine, premium, or foregift, for the making thereof, and so as there be contained in every such limitation or appointment, by way of demise or lease, a clause in the nature of a condition of re-entry for non-payment of the rent or rents thereby to be respectively reserved, and so as the appointee or appointees, lessee or lessees, do execute a counterpart thereof respectively, and do thereby covenant for the due payment of the rent or rents thereby to be respectively reserved, and be not by any clause or words therein to be contained made punishable for waste, or exempted from punishment for committing waste; any thing herein-

before contained to the contrary thereof in anywise notwithstanding: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said H. How and J. Joy, and the survivor of them, and the executors or administrators of such survivor, at any time or times after the solemnization of the said intended marriage, at the joint request and by the joint direction of the said W. Evans and E. Evans, during their joint lives, and after the death of either of them, then at the request and by the direction of the survivor of them, testified by some writing under their or his hands and seals, or hand and seal, attested by two or more credible witnesses, to dispose of and convey, either by way of absolute sale or in exchange for or in lieu of other manors, lands, or hereditaments, to be situate somewhere in that part of Great Britain called England, or in the principality of Wales, all or any part of the manors, messuages, lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, and the inheritance thereof, in fee simple, to any person or persons whomsoever, for such price or prices in money, or for such an equivalent or recompense in manors, lands, or hereditaments, as to them the said H. How and J. Joy, or the survivor of them, or the executors or administrators of such survivor, shall seem reasonable, or to enfranchise any copyhold or customary messuages, lands, or hereditaments holden of any of the said manors hereby granted and released, or expressed and intended so to be, for such price or prices or sum or sums of money as to the said H. How and J. Joy, or the survivor of them, or the executors or administrators of such survivor, shall seem reasonable; and that for the purpose of effectuating such dispositions, conveyances, enfranchisement or enfranchisements (but not for any other purpose) it shall and may be lawful to and for the said H. How and J. Joy, and the survivor of them, and the executors or administrators of such survivor, at such request and by such direction, and so testified as aforesaid, by any deed or deeds, instrument or instruments in writing, sealed and delivered by them or him, in the presence of and attested by two or more credible witnesses, absolutely to revoke, determine, and make void

Power of sale
and exchange
and enfran-
chisement.(a)

(a) Further powers to enfranchise copyholds are given by stat. 4 & 5 Vict. c. 35, but by the 83rd section nothing contained in that act shall operate to prevent any enfranchisement which may be made independently of that act.

all and every or any of the uses, trusts, powers, and provisos hereinbefore limited, declared, and expressed, of and concerning the said premises, or any part or parts, parcel or parcels thereof; and by the same or any other deed or deeds, instrument or instruments in writing, sealed, delivered, and attested as aforesaid, to limit, declare, direct, and appoint any use or uses, estate or estates, trust or trusts, of the said premises, or any part or parts, parcel or parcels thereof, which it shall be thought necessary or expedient to limit, declare, direct, or appoint, in order to effectuate such sales, exchanges, dispositions, conveyances, or enfranchisements as aforesaid: And also that upon any such exchange as aforesaid, it shall and may be lawful to and for the said H. How and J. Joy, or the survivor of them, or the executors or administrators of such survivor, to give or receive any sum or sums of money by way of equality of exchange; and also that upon payment of the money arising by any sale or enfranchisement of the said premises, or any part thereof, or to be received for equality of exchange as aforesaid, or any part thereof, it shall and may be lawful to and for the said H. How and J. Joy, and the survivor of them, and the executors or administrators of such survivor, to sign and give receipts for the same; and that such receipts shall be sufficient discharges to the person or persons to whom the same shall be given for the money therein respectively acknowledged or expressed to be received; and that such person or persons, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable for any loss, misapplication, or non-application of such money, or be obliged or concerned to see to the application thereof: And it is hereby also agreed and declared, that when all or any part or parcel of the manors or lordships, hereditaments and premises, hereby granted and released, or expressed and intended so to be, shall be so sold for a valuable consideration in money, or any such copyhold or customary messuages, lands, or tenements, shall be so enfranchised, or any money shall be so received for equality of exchange as aforesaid, they the said H. How and J. Joy, and the survivor of them, and the executors or administrators of such survivor, shall with all convenient speed lay out and invest the money to arise by such sale or sales, enfranchisement or enfranchisements, or to be received for equality of exchange, in the purchase of other manors, lands, or hereditaments, in fee simple in possession, to be situate somewhere in that part of Great Britain called England, or in the princi-

pality of Wales, of a clear and indefeasible estate of inheritance, or of lands of a leasehold or copyhold tenure, convenient to be held therewith or with the hereditaments hereinbefore settled, yet so that during the lives of the said W. Evans and E. Evans, and the life of the survivor of them, every such purchase shall be made with their or his consent, testified by some writing under their or his hands or hand; and moreover that they the said H. How and J. Joy, or the survivor of them, or the heirs, executors, administrators, and assigns of such survivor, do and shall settle and assure, or cause to be settled and assured, as well the manors, lands, and hereditaments so to be purchased, as the manors, lands, and hereditaments to be vested in the said H. How and J. Joy, or the survivor of them, his heirs, executors, administrators, or assigns, in exchange as hereinbefore is mentioned: To the uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, limitations, declarations, and agreements in and by these presents limited, expressed, declared, and contained, or which shall have been limited or created under any of the powers hereinbefore contained, of and concerning the manors or lordships, hereditaments and premises hereby granted and released, or intended so to be, or such of them as shall be so sold, enfranchised, or conveyed in exchange as aforesaid, or as near thereto as the nature or quality of the lands so to be purchased, and the deaths of parties and other circumstances will then admit of, yet so that if any of the lands or tenements so to be purchased shall be held by lease or leases for years, the same shall not, for the effect or purpose of transmission, vest absolutely in any child or children of the said E. Evans, who shall not attain the age of twenty-one years; but nevertheless any such child or children for the time being entitled to the actual freehold of the hereditaments hereby granted and released, or expressed and intended so to be, or of the said freehold hereditaments so to be purchased, shall, during his or her minority or respective minorities, be entitled to receive the rents, issues, and profits of the leasehold hereditaments so to be purchased: And it is hereby agreed and declared between and by the parties to these presents, that if any of the lands so to be purchased as aforesaid shall be held by lease or leases for lives or years, proper provisions shall be inserted in the settlement to be made thereof as aforesaid, for renewing the same from time to time as occasion shall require, and that the fines, fees,

Trustees' receipts to be good discharges.

and expenses of such renewal or renewals shall from time to time be defrayed by and out of the rents, issues, and profits of the premises so to be purchased, and of which such renewals are to be so made as aforesaid: And further, that until the money arising by such sale or sales, enfranchisement or enfranchisements, or so to be received for equality of exchange as aforesaid, shall be disposed of in the manner hereinbefore mentioned, it shall and may be lawful to and for the said H. How and J. Joy, and the survivor of them, and the executors and administrators of such survivor, by and with such consent as last hereinbefore is mentioned, and so testified as aforesaid, to place out such sum or sums of money at interest, either in the parliamentary stocks or public funds of Great Britain, or upon government or real securities in England, but not on real or other securities in Ireland, (b) in the names or name of such trustees or trustee for the time being, and to alter, vary, transfer, and dispose of the said stocks, funds, and securities, as occasion shall require: And it is hereby also agreed and declared, that the interest, dividends, and annual proceeds arising from such stocks, funds, and securities, shall go and be paid to such person or persons, and be applied to and for such uses, intents, and purposes, and in such manner as the rents, issues, and profits of the manors and hereditaments to be purchased therewith would go or be payable or applicable in case such purchase or purchases and settlement as aforesaid were then actually made: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the several trustees hereby appointed, or the survivor of them, or the executors, administrators, or assigns of such survivor, or of the trustees or trustee for the time being of these presents, for any sum or sums of money payable to them or him, or any of them, under or by virtue of these presents, or in or about the execution of any of the trusts, powers, or authorities herein declared or contained, shall be a sufficient and effectual discharge, or sufficient and effectual discharges for the same, or for so much thereof respectively as in such receipt or receipts shall be expressed or acknowledged to be received; and that the person or persons to whom the same shall be given, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accountable for any

(b) See *ante*, p. 518, s. 5, and note.

use, misapplication, or nonapplication, or be in anywise obliged or concerned to see to the application of the money therein mentioned and acknowledged to be received: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that if the said trustees in and by these presents nominated and appointed, or any future trustee or trustees to be appointed in the stead or place of them or any of them, as hereinafter is mentioned, shall happen to die, or go or reside beyond seas, or be desirous of being discharged of and from, or refuse, or decline, or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, performed, or discharged, then and in such case and when and so often as the same shall happen, it shall and may be lawful to and for the said W. Evans and E. Evans, or the survivor of them, or the executors or administrators of such survivor (but with the consent in writing of the said Jane Grace, during her life, as to any trustee or trustees of the said term of 200 years), by any deed or deeds, instrument or instruments in writing, sealed and delivered by them or him, in the presence of and attested by two or more credible witnesses, from time to time to nominate, substitute or appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying or going to reside beyond seas, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid, and that when and so often as any new trustee or trustees shall be nominated and appointed as aforesaid, all the trust estates, monies, and premises which shall then be vested in the trustee or trustees so dying or going to reside beyond seas, or desiring to be discharged, or refusing, declining or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees, shall be thereupon with all convenient speed conveyed, assigned and transferred in such sort and manner, and so as the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates, monies, and premises respectively, and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees of the same trust estates, monies and premises, then in such new trustees only, to the same uses and upon the same trusts as are hereinbefore declared of and concerning the same trust estates, monies and premises respectively, the trustee or trustees whereof shall so die or go to reside beyond seas, or be de-

Power to
appoint new
trustees.

siours of being discharged or refuse, decline, or become incapable to act as aforesaid, or such of them as shall or may be then subsisting and capable of taking effect: And in order that such manors and other hereditaments may be legally and effectually conveyed to and vested in such new trustee or trustees jointly or solely as occasion may require, it shall and may be lawful to and for the said W. Evans and E. Evans, and the survivor of them, or the executors or administrators of such survivor, by any deed or deeds, instrument or instruments in writing, to be by them or him sealed and delivered in the presence of and attested by two or more credible witnesses, to revoke, determine, or make void the uses, trusts, powers, and agreements in and by these presents limited, declared, and expressed of and concerning the manors and other hereditaments hereby granted and released, or expressed and intended so to be, or any of them, or any part thereof, and by the same or any other deed or deeds, instrument or instruments in writing, to be by them or him respectively sealed and delivered and attested as aforesaid, to limit, declare, or appoint any other use or uses, estate or estates, trust or trusts, of and concerning the said manors and other hereditaments, or any part or parts thereof, which it shall be thought necessary or expedient to limit, declare, direct or appoint for the purpose of conveying or vesting the same premises to or in such new trustee or trustees jointly or solely as occasion may require: (c) and that every such new trustee or trustees shall and may in all things act and assist in the management, carrying on and execution of the trusts to which he or they shall be so appointed, in conjunction with the other then surviving or continuing trustee or trustees of the same trust estates, monies, and premises respectively, if there shall be any such continuing trustee or trustees, if not then by himself and themselves, as fully and effectually, and with all the same power and powers, authority and authorities of consent, approbation, discretion, calling in, laying out, and investing, giving and signing receipts and effectual indemnifications and discharges to purchasers, mortgagees or others, and all other powers and authorities whatsoever, to all intents, effects, constructions and purposes whatsoever, as if he or they had been originally in and by these presents nominated a trustee or trustees for the purposes for which such new trustee or trustees respectively shall be appointed a trustee

(c) See 1 Sand. on Uses, p. 439, 4th ed.

or trustees, and as the trustee or trustees, in these presents named, his or or their heirs, executors, or administrators, in or to whose places such new trustee or trustees shall respectively come or succeed, is or are enabled to do or could or might have done under and by virtue of these presents, if then living and continuing to act in the trusts hereby reposed in them or him, anything hereinbefore contained to the contrary thereof in anywise notwithstanding: PROVIDED ALWAYS, and it is hereby declared, that the said several trustees hereby nominated and appointed, or to be appointed by virtue of the proviso last hereinbefore contained, and each and every of them, and the heirs, executors, administrators and assigns of them, each and every of them, shall be charged and chargeable respectively only for such monies as they shall respectively actually receive by virtue of the trusts hereby in them respectively reposed, notwithstanding his or their or any of their giving or signing, or joining in giving or signing, any receipt or receipts for the sake of conformity; and any one or more of them shall not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects or defaults of the other or others of them, but each and every of them only for his and their own acts, receipts, neglects, or default respectively, and that any one or more of them shall not be answerable or accountable for any banker, broker, or other person, with whom or in whose hands any part of the said trust monies shall or may be deposited or lodged for safe custody, or otherwise in the execution of the trusts hereinbefore mentioned, and that they or any of them shall not be answerable or accountable for the insufficiency or deficiency of any security or securities, stocks or funds, in or upon which the said trust monies, or any part thereof, shall be placed out or invested as aforesaid, nor for any other misfortune, loss, or damage, which may happen in the execution of the aforesaid trusts or in relation thereto, unless the same shall happen by or through their own wilful default respectively; and also that it shall and may be lawful for them the said trustees, in these presents named, and for such future trustee or trustees to be appointed as aforesaid, and every or any of them, their and every of their heirs, executors, administrators, and assigns, by and out of the monies which shall come to their respective hands by virtue of the trusts aforesaid, to retain to and reimburse himself and themselves respectively, and also to allow to his and their co-trustee and co-trustees all costs, charges, damages, and expenses,

Clauses for
indemnity
of trustees.

Covenants for title by tenant for life, and remainderman, according to their interests.

Good right to convey.

which they or any of them shall or may suffer, sustain, expend, disburse, be at or be put unto, in or about the execution of the aforesaid trusts, or in relation therunto: AND the said W. Evans, so far as relates to his estate for life of and in the manors, messuages, lands, and hereditaments hereby granted and released, or expressed and intended so to be, and the title to and right to convey the same, and the quiet enjoyment, freedom from incumbrances, and further assurance thereof, doth for himself, his heirs, executors, and administrators, and the said E. Evans, so far as relates to the remainder in fee tail expectant upon the decease of the said W. Evans, of and in the manors, messuages, lands and hereditaments, hereby granted and released, or expressed and intended so to be, and the title to and right to convey the same, and the quiet enjoyment, freedom from incumbrances, and further assurance thereof, doth for himself, his heirs, executors, and administrators, covenant, promise and agree, with and to the said H. How and J. Joy, their heirs, and assigns, by these presents in manner following, (that is to say,) that for and notwithstanding any act, deed, matter or thing whatsoever, made, done, committed, executed, or suffered by them the said W. Evans and E. Evans, or either of them, or their or either of their ancestors, to the contrary, he the said W. Evans, now, at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely seised of, or otherwise well and sufficiently entitled to the said manors, messuages, lands and hereditaments, hereby granted and released, or expressed and intended so to be, and of and to every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, for an estate during the term of his natural life, and that the said E. Evans is seised or otherwise well and sufficiently entitled to the same hereditaments for an estate of inheritance in fee tail in remainder expectant as aforesaid, without any manner of condition, trust, power of revocation, or limitation of any new or other use or uses, or other restraint, cause, matter, or thing whatsoever, to alter, change, charge, defeat, revoke, make void, lessen, or determine the said estates respectively: AND ALSO that for and notwithstanding any such act, deed, matter, or thing as aforesaid, they the said W. Evans and E. Evans, or one of them, now at the time of the sealing and delivery of these presents, have or hath in themselves or himself good right, full power, and lawful and absolute authority to grant, bargain, sell, release, and assure the manors, messuages, lands, and heredita-

nents hereby granted and released, or expressed and intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said H. How and I. Joy and their heirs, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations, hereinbefore limited, expressed, or declared, of and concerning the same, in the manner and form aforesaid, and according to the true intent and meaning of these presents: AND LIKEWISE, that the manors, messuages, ^{For quiet} ^{enjoyment.} lands, and hereditaments hereby granted and released, or expressed and intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, shall and lawfully may from time to time, and at all times after the solemnization of the said intended marriage, remain, continue, and be to the uses, upon and for the trusts, intents, and purposes hereinbefore limited, expressed, and declared of and concerning the same, and shall and may be peaceably and quietly had, held, and enjoyed, and the rents and profits thereof received and taken accordingly, without the let, suit, trouble, denial, eviction, ejection, disturbance, molestation, hindrance, interruption, claim, or demand whatsoever, of, from, or by the said W. Evans and E. Evans, or either of them, their or either of their heirs, or the heirs of the body of the said E. Evans, or any person or persons claiming or to claim by, from, through, under, or in trust for them, or any or either of them, or their or either of their ancestors: AND that free and ^{Free from in-} ^{cumbrances.} clear, and freely and clearly and absolutely acquitted, exonerated and discharged or otherwise, by them the said W. Evans and E. Evans, or one of them, their or one of their heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, right and title of dower, uses, trusts, wills, entails, statutes, recognizances, judgments, extents, executions, rents, arrears of rent, annuities, debts, legacies, sum and sums of money, estates tail and other titles, troubles, charges and incumbrances whatsoever, made, done, or committed by the said W. Evans and E. Evans, or either of them, their or either of their heirs or ancestors, or any person or persons claiming or to claim by, from, or under them, or any or either of them: AND MOREOVER, that they the said W. Evans ^{For further} ^{assurance.} and E. Evans, and each of them, their and each of their heirs, and the heirs of the body of the said E. Evans,

and every other person having or lawfully or equitably claiming, or who shall or may at any time or times hereafter have, or lawfully or equitably claim, any estate, right, title or interest whatsoever in, to, or out of the manors, messuages, lands, and hereditaments hereby granted and released, or expressed and intended so to be, or in, to, or out of any of them, or any part or parcel thereof, by, from, under, or in trust, for them, or any or either of them, or their or any of their ancestors, shall and will from time to time, and at all times after the solemnization of the said intended marriage, upon every reasonable request to be made for that purpose by the said H. How and J. Joy, or the survivor of them, or his heir, or by any of the parties interested in the premises under these presents, but at the costs and charges of the person or persons requiring the same, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, conveyances, and assurances in the law whatsoever for the further, better, more perfectly and absolutely granting, releasing, conveying and assuring the manors, messuages, lands and hereditaments hereby granted and released, or expressed and intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members and appurtenances, to the uses, upon and for the trusts, intents and purposes, and with, under, and subject to the powers, provisoes, agreements and declarations hereinbefore limited, expressed or declared of or concerning the same, or such of them as shall be then subsisting, undetermined, or capable of taking effect, as by the said H. How and J. Joy, or the survivor of them, or his heirs, or any of the parties interested in the premises, or their or any of their counsel in the law, shall be reasonably devised or advised and required, so that such further assurance or assurances contain or imply in them no further or other covenant or warranty than against the person or persons who shall be required to make and execute the same, his, her, or their heirs, executors, and administrators acts and deeds only, and so that the party or parties who shall be required to make and execute any such further assurance or assurances be not compelled nor compellable, for the making or doing thereof, to go or travel from his, her or their dwelling, or respective dwellings, or usual place or places of abode: AND WHEREAS, under the provisions of the aforesaid act of parliament passed in the session held in the third and fourth years of the reign of King William the Fourth, the said W.

W. Evans and E. Evans would, in default of any appointment to the contrary, be respectively the protectors of the settlement intended to be hereby made: AND WHEREAS the said W. Evans and E. Evans have agreed to appoint the said A., B., and C. to be protectors of the settlement intended to be hereby made in the place and stead of the said W. Evans and E. Evans respectively, in manner hereinafter mentioned: NOW THIS INDENTURE LASTLY WITNESSETH, ^{Appointment of protector by settlors.} that in pursuance and under and by virtue of the power in that purpose contained in the act of parliament lastly thereinbefore referred to, (d) they the said W. Evans and E. Evans do and each of them doth, by these presents, nominate and appoint the said A., B. and C. to be protectors of the settlement intended to be hereby made in and in the place of the said W. Evans and E. Evans, and the survivor of them, for and during the natural lives of the said W. Evans and E. Evans, and the natural life of the survivor of them, with all such powers, authorities, and discretion, as in and by the said act of parliament are given to or vested in the protector of any settlement: PROVIDED ALWAYS, and it is hereby agreed and declared, ^{Power to appoint new protector in case of death or relinquishment of the other protector.} and the said W. Evans and E. Evans do hereby respectively direct and declare that in case, during the lives of the said W. Evans and E. Evans, or the life of the survivor of them the said A., B., and C., or any or either of them, or any protector to be appointed as hereinafter mentioned, shall die, or shall by deed relinquish his or her office of protector of the settlement intended to be hereby made, then and in such case, and as often as the same shall so happen, it shall be lawful for the surviving or other protector or protectors for the time being, or if there shall be no such protector, then for the protector who shall so relinquish his office; and if there shall be no such protector, then for the executors or administrators of the last deceased protector, by any deed or deeds duly executed and to be inrolled pursuant to the direction for that purpose contained in the said last mentioned act of parliament, to appoint any one person or number of persons in esse, and not being an alien or aliens, to be a protector or protectors

(d) See *ante*, s. 32, p. 319.—The effect of appointing any person to be protector in the place of the tenants for life, and perpetuating the protectorship, will be, that a tenant in tail under the settlement will not be able, during the existence of the prior estates, to bar the remainders over without the consent of such protector.

of the settlement intended to be hereby made during the lives of the said W. Evans and E. Evans, and the life of the survivor of them, in the place or stead of any one person or number of persons who shall die or relinquish his or their office of protector as aforesaid; and that when and so often as any person or persons shall be appointed protector or protectors as aforesaid, such person or persons shall be the protector of the settlement intended to be hereby made, in case there shall be no other protector hereby appointed, or to be appointed in pursuance of this power; but if any other person or persons hereby appointed, or to be appointed as aforesaid, shall continue protector, then joint protector with such other person or persons: PROVIDED NEVERTHELESS, that by virtue or means of any appointment to be made under the power lastly hereinbefore contained, the number of persons composing the protector of the settlement intended to be hereby made shall not at any one time exceed three. IN WITNESS, &c. (c)

(c) This deed must be enrolled in Chancery within six calendar months after its execution (see *ante*, s. 32, p. 320). In order to avoid the necessity of inrolling so long a deed, where a protector is not appointed, it will be convenient, in a case like the preceding, for the father and son, before the settlement, to join in a deed to bar the entail, and to limit the estate to such uses as they shall jointly appoint.



No. XIV.

RELINQUISHMENT of the Office of Protector and Appointment of another in his Place, under the Power contained in the last Settlement.

Recital of
settlement
appointing
protector.

THIS INDENTURE, made the 6th day of June, A.D. 18—, between A. of &c. [*the protector resigning*] of the first part, B. of &c., and C. of &c. [*the continuing protectors*] of the second part, and D. of &c. [*the new protector*] of the third part. WHEREAS by indentures of lease and release, bearing date respectively the 1st and 2d days of January, 18—, (duly enrolled in her majesty's High Court of Chancery, on the 3d day of the same month,) the release being made or expressed to be made between [*parties*], being the settlement made previously to and in consideration of the marriage then intended to be and

inace duly solemnized between the said E. Evans and
 Grace, divers manors, messuages, lands, and other
 hereditaments in the same indenture particularly men-
 tioned and described, were duly conveyed and assured,
recite the limitations shortly, as far as the estate for life
of E. Evans,] with divers remainders over. And by the
 indenture now in recital the said W. Evans and E. Evans
 did nominate and appoint the said A., B., and C. to be
 protectors of the settlement intended to be thereby made,
 in lieu and in the place of the said W. Evans and
 E. Evans, [see *ante*, p. 649]. And by the indenture
 now in recital it was agreed and declared, [*here recite the*
power, see ante, p. 649]. AND WHEREAS the said A.
 is desirous of relinquishing his office of protector of the
 said recited indenture of settlement, and the said B. and
 C., by virtue of the power in the same indenture con-
 tained, (a) have agreed to appoint the said D. to be
 protector, in the place of the said A., of the said recited
 settlement jointly with the said B. and C., and the
 said D. has consented and agreed to accept the said
 office, as he doth hereby testify and acknowledge. NOW
 THIS INDENTURE WITNESSETH, that he the said A. hath
 relinquished, given up, and resigned, and by these pre-
 sents doth relinquish, give up, and resign his office of
 protector of the said recited indenture of settlement, and
 all powers, authorities and discretion incident to the office
 of such protector as aforesaid: AND THIS INDENTURE
 ALSO WITNESSETH, that in pursuance and further per-
 formance of the said recited agreement, and by force
 and virtue and in exercise and execution of the power or
 authority so given and reserved to the said B. and C. by
 the said in part recited indenture of settlement, and of
 every or any other power or authority in anywise
 enabling them in this behalf, they the said B. and C. do
 and each of them doth by this present deed or writing
 under their respective hands and seals nominate and
 appoint the said D. to be protector of the said recited
 indenture of settlement in the place of the said A. jointly
 with the said B. and C. and the survivor of them, during
 the lives of the said W. Evans and E. Evans, and the
 life of the survivor of them, with all such powers, autho-

Desire of
 protector to
 resign.

FIRST TESTA-
 TUM.
 Relinquish-
 ment by one
 protector.

SECOND
 TESTATUM.
 Appointment
 of new pro-
 tector.

(a) Or, AND WHEREAS the said A. departed this life on
 the — day of — now last past, and the said B. and C.
 by virtue of the power contained in the said recited indenture
 of settlement.

rities, and discretion as are incident to the office of such protector as aforesaid, and to the intent that the said B. C., and D. shall and may, as protectors of the said recited settlement, have and exercise the same powers, authorities and discretion, to all intents and purposes whatsoever, as if the said D. had been originally in and by the said recited indenture of settlement appointed protector as aforesaid jointly with the said B. and C. It
WITNESS, &c. (b)

(b) A deed of this kind must be enrolled in Chancery within six calendar months after its execution. (See *stat.*, s. 32, p. 320.)

—◆—
No. XV.

CONVEYANCE by two Tenants in Common in Tail, and by another Tenant in Common in Tail, and her Husband, for the purpose of barring all Estates Tail, and effecting a Partition of the Estate. (a)

Parties.

Recital of
lease and re-
lease, creat-
ing the entail.

THIS INDENTURE, made the — day of —, A. D. 18—, between John Gay, of &c. esq., the only son of James Gay, late of &c. esq., deceased, by Mary his late wife, before Mary Jones, spinster, of the first part; Lucy Gay, of &c. spinster, one of the daughters of the said James Gay and Mary his wife, of the second part; James Still, of &c. esq., and Mary his wife, late Mary Gay, spinster, the only other daughter of the said James Gay and Mary his wife, of the third part; and [trustee] of the fourth part. WHEREAS by indentures of lease and release, bearing date respectively on or about the 1st and 2nd days of May, 1808, the release being made, or expressed to be made, between the said James Gay, of the first part, the said Mary Gay, the late wife of the said James Gay, by her then name and description of Mary Jones, spinster, of the second part, A. and B. of the third part, and C. and D. of the fourth part; (being the settlement made previously to and in consideration of the marriage then intended to be and shortly afterwards duly had and solemnized between the said James Gay and Mary Jones) the messuages, farms, lands, and hereditaments hereinafter described, and intended to be hereby granted

(a) On the law of partition, see 6 Jarm. Conv. by Sweet, 586—612.

and released, were duly conveyed and assured, from and after the solemnization of the said then intended marriage, to the use of the said James Gay and his assigns for his natural life, with remainder to the use of the said A. and B. and their heirs during the life of the said James Gay, upon trust to preserve the contingent remainders thereafter limited, with remainder to the use and intent that the said Mary Jones and her assigns, in case she should survive the said James Gay, might, immediately after his decease, receive for her life, as a jointure and in bar of dower, the yearly rent charge of 500*l.*, payable as therein mentioned, with the usual powers of distress and entry in case of non-payment of the same, and subject thereto to the use of the said C. and D., for the term of 100 years, to commence from the day next before the day of the decease of the said James Gay, upon certain trusts therein declared, for better securing the due and punctual payment of the said rent charge, with remainder to the use of the child, if only one, and if more than one, all the children of the said intended marriage of the said James Gay and Mary Jones, to be equally divided between them, if more than one, share and share alike, as tenants in common, and not as joint tenants, and the heirs of the body or several and respective bodies of the same child or children respectively lawfully issuing, with cross-remainders between them in tail, with divers remainders over. AND WHEREAS the said Mary Gay, the wife of the said James Gay, died in his lifetime, and he said James Gay departed this life on or about the 4th day of March, 1830, leaving the said John Gay, Lucy Gay, and Mary Still, the only children of the marriage of the said James Gay and Mary his wife; AND WHEREAS he said John Gay, Lucy Gay, and J. Still and Mary his wife, are desirous of and have agreed to join in barring all estates tail and remainders and reversions thereupon expectant or depending of and in the messuages, farms, lands, and hereditaments, mentioned and comprised in the said hereinbefore in part recited indentures of lease and release, and thereby granted and released, or expressed and intended so to be, and have also agreed to make a partition and division of the same hereditaments, which they the said John Gay, Lucy Gay, and J. Still and Mary his wife, in right of the said Mary, under and by virtue of the limitations contained in the same indenture of release, have become entitled as tenants in common in tail, and in order to effect such purposes and agreements, they have agreed to convey and assure the

Death of
Jointress and
tenant for life.

Agreement to
bar entail and
make parti-
tion.

Agreement as
to division of
the estates.

same hereditaments and premises unto the said [trustee] and his heirs, To the uses, upon the trusts, and for the ends, intents, and purposes hereinafter expressed and declared of and concerning the same : AND WHEREAS the messuage and several hereditaments and premises comprised in the first schedule hereunder written, being part of the hereditaments so agreed to be divided, have been allotted and appropriated unto the said John Gay, as the part, share, and proportion to be taken by him in severalty of the said hereditaments so agreed to be parted and divided as aforesaid : AND the several hereditaments mentioned and comprised in the second schedule hereunder written, other part of the hereditaments so agreed to be divided as aforesaid, have been allotted and appropriated unto the said Lucy Gay, as the part, share, and proportion to be taken by her in severalty of the said hereditaments so agreed to be parted and divided as aforesaid : AND the several hereditaments mentioned and comprised in the third schedule hereunder written, residue of the hereditaments so agreed to be divided, have been allotted and appropriated unto the said John Still and Mary his wife, in right of the said Mary, as the part, share, and proportion to be taken by the said J. Still and Mary his wife, in right of the said Mary, in severalty, of the said hereditaments so agreed to be parted and divided as aforesaid.

FIRST TESTA-
MENT.
Conveyance
by the tenants
in common to
a trustee.

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for carrying the same into effect, and to the intent and purpose to defeat and extinguish the estates tail of the said John Gay, Lucy Gay, and Mary Still, of and in the messuages, farms, lands, and other hereditaments hereinafter mentioned, and intended to be hereby granted and released, and all remainders, reversions, estates, rights, powers, and interests to take effect after the determination, or in defeasance of such estates tail, or any of them, and for conveying and assuring the same premises to the uses, upon and for the trusts, intents, and purposes hereinafter respectively limited, expressed, and declared of and concerning the same, they the said John Gay, Lucy Gay, and James Still and Mary his wife, under and by virtue and in pursuance of the powers and provisions given by and contained in an act of parliament passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," HAVE, and each and every of them HATH, granted, aliened, released,

posed of and confirmed, and by these presents (b) do,
 and each and every of them doth, grant, alien, release,
 dispose of, and confirm, unto the said [trustees], (in his
 actual possession, &c.) (see *ante*, p. 572,) THE messuages, Parcels.
 farms, lands, and hereditaments mentioned and described
 in the first, second, and third schedules hereunder written,
 and each and every of them: And also all and singular other
 the messuages, farms, lands, tenements, and hereditaments
 whatsoever, of them the said John Gay, Lucy Gay, and
 J. Still and Mary his wife, in right of the said Mary, and
 each and every of them, mentioned and comprised in and
 conveyed and assured by the said hereinbefore in part
 recited indentures of lease and release, or wherein or
 thereto they or any of them, or any person or persons in
 trust for them or any of them, hath or have any manner
 of estate, right, title or interest in possession, reversion,
 remainder or expectancy; TOGETHER with all and singular All houses,
&c.
 houses, outhouses, edifices, buildings, barns, stables,
 coach-houses, cottages, yards, gardens, orchards, backsides,
 lots, lands, meadows, pastures, commons, common of
 pasture and other commonable rights, mines, minerals,
 quarries, furzes, trees, woods, underwoods, and the ground
 and soil thereof, mounds, fences, hedges, ditches, ways,
 watercourses, liberties, privileges, easements, profits, com-
 modities, emoluments, hereditaments, and appurtenances
 whatsoever to the said messuages, farms, lands, heredita-
 ments and premises belonging, or in any wise appertain-
 ing, or with the same or any of them respectively now
 or at any time heretofore demised, leased, held, used,
 occupied or enjoyed, or accepted, reputed, deemed, taken,
 or known as part, parcel or member of them, or any part
 of them, or appertaining thereunto, with their and every
 of their appurtenances: AND the reversion and reversions, Reversion,
&c.
 remainder and remainders, yearly and other rents, issues,
 and profits thereof: AND all the estate, right, title, in- All the estate,
&c.
 terest, use, trust, inheritance, term and terms for years
 and for life and lives, property, possession, benefit and
 equity of redemption, claim and demand whatsoever, of
 them the said John Gay, Lucy Gay, and J. Still and
 Mary his wife, respectively, of, in, to or out of the said
 hereditaments, and every part and parcel of the same,
 with their and every of their rights, members, and appur-
 tenances: TO HAVE AND TO HOLD the said messuages, Habendum.
 farms, lands, hereditaments, and all and singular other
 the premises hereby granted and released, or expressed

(b) If a lease for a year is not used, refer to the stat. 4 & 5
 Vict. c. 21. See *ante*, p. 571.

Declaration
of the uses of
each share in
severalty, by
reference to
the schedules.

and intended so to be, with their and every of their rights and appurtenances, unto the said [trustee] and his heirs for ever, freed and absolutely discharged from all estate tail and remainders or reversions thereupon expectant or depending; To THE USES, upon and for the trusts, intents and purposes hereinafter limited, expressed and declared of and concerning the same, (that is to say,) As TO, FOR, AND CONCERNING such part and parts of the hereditaments and premises hereby granted and released, or expressed and intended so to be, as are mentioned and comprised in the said first schedule hereunder written, with their appurtenances, To THE ONLY USE and behoof of the said John Gay, his heirs and assigns for ever, to be by him and them held in severalty, in lieu of the undivided part or share of the said John Gay, of and in the entirety of the said messuages, farms, lands, and other hereditaments hereby granted and released, or expressed and intended so to be, [see declaration to prevent dower, ante, p. 574.] AND AS TO, FOR, AND CONCERNING such part and parts of the hereditaments and premises hereby granted and released, or expressed and intended so to be, as are mentioned and comprised in the said second schedule hereunder written, with their appurtenances, To THE ONLY USE and behoof of the said Lucy Gay, her heirs and assigns for ever, to be by her and them held in severalty, in lieu of the undivided part or share of the said Lucy Gay of and in the entirety of the messuages, farms, lands and other hereditaments hereby granted and released, or expressed and intended so to be; AND AS TO, FOR, AND CONCERNING such part and parts of the hereditaments and premises hereby granted and released, or expressed and intended so to be, as are mentioned and comprised in the said third schedule hereunder written, with their appurtenances, To THE USE of such person and persons, for such estate or estates, interest or interests, and subject to such powers, provisoes, conditions, restrictions and limitations, and with such remainders over, and charged and chargeable with such sums of money, either annual or in gross, as they the said J. Still and Mary his wife, by any deed or deeds, instrument or instruments in writing, to be by them respectively sealed and delivered in the presence of and attested by two or more credible witnesses, shall from time to time direct, limit or appoint, and in default of and until such direction, limitation or appointment, and so far as any such direction, limitation or appointment, if incomplete, shall not extend, To THE USE of the said [trustee] and his heirs, during the joint natural lives of the said J. Still and Mary his wife, UPON TRUST

that the said [*trustee*], his heirs and assigns, do and shall, during the joint natural lives of the said J. Still and Mary his wife, collect, get in, and receive the yearly rents, issues and profits of the hereditaments and premises hereinbefore limited to the use of the said [*trustee*] and his heirs as last aforesaid, as and when the same shall become payable, and pay the same rents to such person or persons, and for such intents and purposes as the said Mary Still, notwithstanding her coverture, by any writing or writings under her hand, shall from time to time, but so as not to deprive herself by sale, mortgage or otherwise by anticipation, direct or appoint, and for want of such direction or appointment into her own hands for her own sole, separate and peculiar use and benefit, and without being in anywise subject or liable to the debts, control, interference or engagements of the said J. Still her husband; and it is hereby declared that the receipt or receipts of the said Mary Still, and such person or persons as she shall from time to time direct to receive such rents, issues and profits, after the same shall have become due, shall be a good and effectual release and discharge, or good and sufficient releases or discharges for so much money as in such receipt or receipts shall be expressed or acknowledged to be received, and that no receipt or receipts which shall be given before the same rents, issues and profits have become due shall discharge the said [*trustee*] or his heirs; (b) And if the said Mary Still shall survive the said J. Still, then immediately after the decease of the said J. Still, To the use of the said Mary Still, her heirs and assigns for ever; but if the said Mary Still shall die in the life-time of the said J. Still, then immediately after the decease of the said Mary Still, To the use of the said J. Still and his assigns, during the term of his natural life; and from and immediately after his decease, Then to the use of such person or persons, for such estate or estates, interest or interests, and with, under and subject to such powers, provisoes, conditions and limitations, and with such remainders over, and charged and chargeable with such sums of money,

(b) It has been lately held that the form commonly used for restraining married women from disposing of their separate property by anticipation is insufficient for that purpose. The receipt clause ought to declare that the receipts of the married woman, to be given from time to time, after the income of the property shall have become due, shall be, and that no other receipts shall be, sufficient discharges to the trustees. (*Brown v. Bamford*, 11 Sim. 127.)

either annual or in gross, as she the said Mary Still, notwithstanding her coverture, shall by her last will and testament in writing, or any codicil or codicils therein in writing, or any writing or writings in the nature of a purporting to be a will or codicil, to be respectively by her signed in the presence of and attested by two or more credible witnesses, direct, limit or appoint; and in default of such direction, limitation or appointment, and so far as any such direction, limitation or appointment, if incomplete, shall not extend, To the use of the said Mary Still, her heirs and assigns, for ever: And it is hereby declared that the hereditaments and premises comprised in the said third schedule are limited to the uses, upon the trusts, and for the intents and purposes hereinbefore expressed and declared concerning the same, in lieu of the undivided part or share of the said J. Still and Mary his wife, in right of the said Mary, of and in the entirety of the said messuages, farms, lands and other hereditaments hereby granted and released, or expressed and intended so to be: AND the said J. Still doth hereby for himself, his heirs, executors and administrators covenant and agree with the said [trustee] and his heirs, (c) That the said Mary Still (she hereby consenting) shall and will forthwith, or as soon as conveniently may be after the execution of these presents, at the costs and charges of the said J. Still, his heirs, executors or administrators, duly acknowledge these presents, and perfect the same in other respects, with the solemnities prescribed by law for rendering the deeds of married women effectual for passing their interests in lands. PROVIDED ALWAYS and it is hereby declared, that if the said [trustee] or any trustee to be appointed as hereinafter is mentioned shall die, or decline or become incapable to act in the trust aforesaid before the same shall be executed or become incapable of taking effect, then and so often as the same shall happen it shall be lawful for the said Mary Still, notwithstanding her coverture, by any deed duly executed by her, to appoint any other person to be a trustee in the place of the trustee so dying, declining, or becoming incapable to act, and that upon every such appointment the hereditaments and premises comprised in the said third schedule hereunder written, or such of them as shall not have been previously disposed of under the joint power of appointment hereinbefore limited to the said J. Still and Mary his wife, shall be conveyed in such manner that the same may be effectually vested in the new trustee and his heirs

Covenant by J. Still that his wife shall acknowledge the deed before Commissioners.

Power for Mary Still to appoint a new trustee, and for his indemnity.

(c) See other form of covenants of this kind, *ante*, p. 575.

during the joint lives of the said J. Still and Mary his wife, upon the trusts hereinbefore declared concerning the same premises. And it is hereby declared that the receipts in writing of the trustee for the time being of these presents shall be effectual discharges for any sum or sums of money payable to him in and about the execution of the trusts aforesaid, and that the trustee for the time being under these presents shall not be answerable for any involuntary losses which may happen in the execution of the trusts aforesaid, and that it shall be lawful for such trustee for the time being to reimburse himself out of the monies to be received by him under the trusts hereby declared all such costs and expenses as he shall incur or be put unto in the execution of the aforesaid trusts, or in relation thereto: AND each of them the said John Gay and Lucy Gay, so far as relates to his and her undivided third part or share of and in the messuages, farms, lands, hereditaments and premises hereby granted and released, or expressed and intended so to be, and the quiet enjoyment, freedom from incumbrances, and further assurance thereof, doth for himself and herself respectively, and his and her respective heirs, executors and administrators, and the said J. Still, so far as relates to the undivided third part or share of the said J. Still and Mary his wife, in right of the said Mary, of and in the said messuages, farms, lands, hereditaments and premises hereby granted and released, or expressed and intended so to be, and the quiet enjoyment, freedom from incumbrances, and further assurance thereof, doth for himself and his heirs, executors and administrators, covenant, promise and agree with and to the said [trustee] and his heirs, and *cestuis-que* use, and separately with every of such *cestuis-que* use, in manner following, (that is to say,) THAT the messuages, farms, lands, and other hereditaments hereby granted and released, or expressed and intended so to be, with their appurtenances, shall and may from time to time, and at all times hereafter, go and remain to the several uses hereinbefore respectively limited, expressed and declared of and concerning the same, and be peaceably and quietly entered into and upon, and be held, occupied, possessed and enjoyed, and the rents, issues, and profits thereof, and of every part thereof, had, received, and taken accordingly, without the lawful let, suit, trouble, denial, eviction, interruption, claim or demand whatsoever of or by them the said John Gay, Lucy Gay, and J. Still and Mary his wife, or any or either of them, or any other person or persons claiming or to claim by, from, through, under or in trust for them or any

Covenants
for quiet
enjoyment.

Free from incumbrances.

or either of them, And that free and clear, and freely and clearly, and absolutely acquitted, exonerated, released and for ever discharged or otherwise, by the said John Gay, Lucy Gay, and J. Still and Mary his wife, or some or one of them, their or some or one of their heirs, executors or administrators, well and sufficiently saved, defended, kept harmless and indemnified, of, from, and against all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, right and title of dower, uses, trusts, entails, wills, statutes merchant or of the staple, recognizances, judgments, executions, rents, arrears of rent, annuities, legacies, sums of money, yearly payments, forfeitures, re-entries, cause and causes of forfeiture and re-entry, debts of record, debts due to the queen's majesty, and of, from and against all other estates, titles, troubles, charges, debts and incumbrances whatsoever, either already had, made, executed, occasioned or suffered, or hereafter to be had, made, executed, occasioned or suffered by the said John Gay, Lucy Gay, and J. Still and Mary his wife, or any or either of them; AND FURTHER, that they the said John Gay, Lucy Gay, and J. Still and Mary his wife respectively, and their issue respectively, and all and every other persons and person having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said messuages, farms, lauds, and other hereditaments hereinbefore granted and released, or expressed and intended so to be, or any of them, or any part thereof, by, from, under or in trust for them the said John Gay, Lucy Gay, and J. Still and Mary his wife respectively, or any of them, their or any of their heirs or issue respectively, shall and will from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the person or persons beneficially entitled to the same premises by virtue of the uses and limitations hereinbefore expressed and declared, or any of them, make, do, acknowledge and execute, or cause and procure to be made, done, acknowledged and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, conveyances, and assurances, in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying and assuring of the said messuages, farms, lands, and other hereditaments hereinbefore granted and released, or expressed and intended so to be; and every part thereof, with their appurtenances, to the uses here-

For further assurance.

before limited and declared of and concerning the same, as by the said person or persons making such request and so entitled as aforesaid, his, her or their heirs, appointees or assigns, or his, her or their counsel in the law shall be reasonably devised or advised and required; so that the person or persons who shall be required to make and execute such further assurance or assurances be not compelled nor compellable, for the making or doing thereof, to go or travel from his, her, or their dwelling, or respective dwellings, or place or respective places of residence or abode: AND WHEREAS, upon the treaty for the aforesaid partition, it was agreed that the several title-deeds, evidences, and writings relating to the said messuages, farms, lands and other hereditaments hereby granted and released, or expressed and intended so to be, should be deposited with the said John Gay, upon his entering into a covenant to produce the same, and permit copies to be made thereof, when thereunto required, in manner hereinafter mentioned, and in pursuance of such agreement the title-deeds, evidences and writings mentioned in the fourth schedule hereunder written, have been delivered to the said John Gay, which he doth hereby acknowledge. (d) NOW THIS INDENTURE LASTLY WITNESSETH, that in pursuance and performance of the said last-recited agreement, and in consideration of the premises, the said John Gay, for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree, to and with the said [*trustee*], his heirs and *cestuis-que* use, and as a separate covenant to and with each of them, the said Lucy Gay, her heirs and assigns, and the said J. Still and Mary his wife, their and her appointees, heirs and assigns, that he the said John Gay, his heirs, executors, administrators or assigns, shall and will from time to time, and at all times hereafter (unless prevented by fire or other accident happening without his or their default), upon every reasonable request, and at the proper costs and charges of the person or persons for the time being beneficially entitled to the premises comprised in the said second and third schedules, by virtue of the uses and limitations hereinbefore contained, or any of them, produce and show forth, or cause to be produced and shown forth, to him, her or them, or any of them, or to such person or persons as he, she or they, or any of them, shall by writing direct, desire or require, or at any trial, hearing or examination, in any

Recital of
agreement as
to title-deeds.

SECOND
TESTATUM.
Covenant for
production of
title-deeds.

(d) See *ante*, p. 593, note.

court of law or equity, or other judicature, or upon the execution of any commission in England, as occasion shall be or require, the several deeds, evidences and writings mentioned in the fourth schedule hereunder written or hereunto annexed, and every or any of them, for the manifestation, defence and support of the estate, right, title, interest, property or possession of the person or persons for the time being beneficially entitled as last aforesaid, or any of them, of, in, and to all or any part of the said messuages, farms, lands and other hereditaments, with their appurtenances, comprised in the said second and third schedules hereunder written: AND ALSO, that he the said John Gay, his heirs, executors, administrators or assigns, shall and will, at the request, costs and charges of the person or persons for the time being beneficially entitled as last aforesaid, give and deliver to him, her, or them, one or more fair, true and attested copy and extract, or copies and extracts, of and from the same deeds, evidences and writings, or any of them, and shall and will permit and suffer such copies and extracts respectively to be examined and compared with the originals thereof, either by such person or persons as last aforesaid, or by any person or persons whom he, she or they shall appoint in writing under his, her or their hand or hands for that purpose. IN WITNESS, &c. (e)

THE FIRST SCHEDULE to which the above-written indenture refers.

ALL THAT, &c. [*Description of the portion of the estate allotted to John Gay.*]

THE SECOND SCHEDULE to which the above-written indenture refers.

ALL THAT, &c. [*Description of the portion of the estate allotted to Lucy Gay.*]

THE THIRD SCHEDULE to which the above-written indenture refers.

ALL THAT, &c. [*Description of the portion of the estate allotted to J. Still and Mary his wife.*]

THE FOURTH SCHEDULE to which the above-written indenture refers.

[*A list of the deeds covenanted to be produced, setting out the dates, and the names and descriptions of the parties.*]

(e) This deed must be inrolled in Chancery. See forms of acknowledgment, certificate, and affidavits, *ante*, p. 581—589.

No. XVI.

MORTGAGE in Fee, by a Tenant in Tail in Remainder, after an absolute Consent had been given by the Protector of a prior Settlement, with Variations where the Protector joins for the purpose of consenting to the Mortgage and Power of Sale. (See 3 & 4 Will. 4, c. 74, s. 21, *ante*, p. 311—313, n.) (a)

THIS INDENTURE, made the — day of —, A. D. Parties. 18—, between Edward Dunn, of &c. esq. eldest son and heir of the body of D. Dunn, of &c. esq. of the one [or first] part; [where protector consents by the same deed, he should be a party] of the second part; and [mortgagee], of the other [or third] part; **WHEREAS** by indentures of lease and release, bearing date respectively on or about the 9th and 10th days of March, 1812, the release being made, or expressed to be made, between [parties], the messuages, lands, and hereditaments, hereinafter described and intended to be hereby bargained and sold, were (amongst other hereditaments) duly conveyed and assured, [to the use of D. Dunn for life, with remainder to his first and other sons in tail]; **AND** **WHEREAS** by a deed poll under the hand and seal of the said [D. Dunn], bearing date the 1st day of February, 1834, and duly inrolled in His Majesty's High Court of Chancery on the 12th day of the same month, after reciting the hereinbefore in part recited indentures of lease and release, and reciting that (see *ante*, p. 605); it was by the indenture now in recital witnessed, that the said D. Dunn did give and grant his absolute and unqualified consent and approbation to any conveyance, assurance, and disposition, which should be made and executed by the said E. Dunn, either on the day of the date of the said deed poll, or at any time thereafter, of all or any part or parts of the manors, messuages, farms, lands, hereditaments, and premises, comprised in and conveyed and assured by the said therein and hereinbefore in part

Recital of
creation of
entail.

Deed of con-
sent of pro-
tector.

(a) It will be frequently advisable for the tenant in tail to execute the necessary assurance for barring the entail, by a deed to be executed and inrolled before the mortgage, which will supersede the necessity of inrolling the mortgage deed. This form can easily be adapted to the case of a mortgage by a tenant in tail in possession.

Application
for loan.

Recital of
agreement of
protector to
consent to
mortgage.

Protector
consents to
mortgage
made by this
deed.

Conveyance
by tenant in
tail.

recited indentures of lease and release, (subject nevertheless and without prejudice to the estate for life of the said D. Dunn, of and in the same hereditaments, and all powers, privileges, and exemptions, (except the power of consenting as protector), annexed to such estate ; (b) AND WHEREAS the said E. Dunn has applied to and requested the said [mortgagee] to advance and lend him the sum of 1500*l.*, which the said [mortgagee] has consented and agreed to do upon having the same sum, with interest for the same, secured in manner hereinafter expressed. [*Where the protector consents by the same deed, instead of the recital of the deed poll, the following recital and operative part should precede the conveyance by the mortgagor.*] AND WHEREAS the said [protector], in order to enable the said [mortgagor] to make an effectual security for the said sum of 1500*l.* and interest, as against all persons whose estates are to take effect after the determination or in defeasance of the estate tail of the said [mortgagor], of and in the messuages, lands, and hereditaments hereinafter described, and intended to be hereby granted and released, has agreed, as the protector of the said recited settlement, to consent to the conveyance, assurance, and disposition intended to be made by these presents, in manner hereinafter expressed : NOW THIS INDENTURE WITNESSETH, that in pursuance and performance of the said recited agreement on the part of the said [protector], He the said [protector] HATH given and granted, and by these presents BOTH give and grant, his absolute and unqualified consent to the conveyance, assurance, and disposition intended to be made by the said [mortgagor] in and by these presents, subject, nevertheless, and without prejudice to the estate for life of the said [protector], or any power, privilege, or exemption annexed to such estate. Now [*or And*] THIS INDENTURE [*or further*] WITNESSETH, that in pursuance and performance of the said recited agreement, [*or on the part of the said mortgagor*], and for and in consideration of the sum of 1500*l.* of lawful money of Great Britain to the said E. Dunn in hand well and truly paid by the said [mortgagee] at or immediately before the sealing and delivery of these presents, the receipt of

(b) In cases where it appears that a tenant for life has powers, it must be ascertained that they are not of such a kind as will enable him to defeat the mortgage : it is assumed in this case, that the tenant for life had only the usual power of leasing at rack rent for the term of twenty-one years.

which said sum of 1500*l*, the said E. Dunn doth hereby admit and acknowledge, and of and from the same, and every part thereof, doth acquit, release, and discharge he said [*mortgagee*], his heirs, executors, administrators, and assigns, and every of them, for ever, by these presents, and in order to defeat the estate tail of the said E. Dunn of and in the messuages, lands, and hereditaments hereinafter described and intended to be hereby bargained and sold, and all remainders, reversions, estates, rights, interests, and powers, to take effect after the determination or in defeasance of such estate tail, he the said E. Dunn, under and by virtue and in pursuance of the powers and provisions given by and contained in an act of parliament made and passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled, "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," and with the consent of the said D. Dunn, testified [by the said recited deed-poll,] [*or, as aforesaid*], HATH granted, bargained, sold, aliened, disposed of, and confirmed, and by these presents doth grant, bargain, sell, alien, dispose of, and confirm unto the said [*mortgagee*] and his heirs (c) ALL THAT the remainder of him the said E. Dunn, expectant and to take effect on the decease of the said D. Dunn, of and in ALL THAT, &c. [*parcels, general words, reversions, &c. and all the estate, &c. ante, p. 572.*]

TO HAVE AND TO HOLD the said messuages, lands, and all and singular other the hereditaments hereby bargained and sold, or expressed and intended so to be, subject and without prejudice to the estate for life therein of the said [*protector*], and all powers, privileges, and exemptions thereto annexed, (except the power of consenting as protector), unto the said [*mortgagee*] and his heirs, To the only use and behoof of the said [*mortgagee*], his heirs and assigns for ever, freed and absolutely discharged from the estate tail of the said E. Dunn, and all other estates tail, remainders, reversions, limitations and conditions thereupon expectant or depending, but subject nevertheless to the proviso or agreement for redemption of the said hereditaments and premises hereinafter contained, (that is to

Habendum.
To use of
mortgagee in
fee.

(c) As the conveyance by a tenant in tail must be enrolled, the expense of a lease for a year may be avoided in a case like the present, by taking the conveyance by a bargain and sale; besides, as this is a conveyance of a remainder, it would be valid as a grant without any lease for a year.

Proviso for
redemption.

say,) (d) PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said E. Dunn and the said [mortgagee], and the true intent and meaning of them and of these presents, nevertheless, are, that if the said E. Dunn, his heirs, executors, administrators or assigns, shall and do well and truly pay, or cause to be paid, to the said [mortgagee], his executors, administrators, or assigns, at or in the common dining hall of Lincoln's Inn, in the county of Middlesex, the sum of 1500*l.* of lawful money of Great Britain, and the sum of 75*l.* of like lawful money, as and for one year's interest for the same, at the rate of 5*l.* for every 100*l.* for a year, making together the sum of 1575*l.* in the parts, shares, and proportions, and on or at the days or times hereinafter mentioned, (that is to say,) the sum of 37*l.* 10*s.* part thereof, being half a year's interest for the said sum of 1500*l.* at the rate aforesaid, on the — day of — next ensuing the date of these presents, which will be in the year of our Lord 18—, and the sum of 1537*l.* 10*s.* residue thereof, being the whole of the said principal sum of 1500*l.* and another half year's interest for the same, at the rate aforesaid, on the — day of — then next following, which will be in the said year 18—, without any deduction or abatement whatsoever out of the same or any part thereof, for or in respect of any taxes, charges, rates, assessments, payments, or impositions, taxed, charged, assessed, or imposed, or to be taxed, charged, assessed, or imposed on the said messuages, lands, hereditaments, and premises hereby bargained and sold, or expressed and intended so to be, or any of them, or upon the said sum of 1575*l.* or any part thereof, or upon the said [mortgagee], his heirs, executors, administrators, or assigns, for, upon account, or in respect of the said messuages, lands, hereditaments, and premises, or any of them, or of the said sum of 1575*l.* or any part thereof, by authority of parliament or otherwise howsoever, (except for or on account of the present or any future tax upon property or income,) or for, upon account, or in respect of any other matter, cause, or thing whatsoever, then and in such case he the said [mortgagee], his heirs and assigns, shall and will at any time after such payments shall be so made as aforesaid, upon the request and at the proper costs and charges of the said E. Dunn, his heirs or assigns, re-convey the said messuages, lands, hereditaments,

(d) It may be observed, that when brevity is an object, the remaining provisions of this deed may be shortened.

nants, and premises hereby bargained and sold, or expressed and intended so to be, with their appurtenances, subject to the estate for life of the said D. Dunn, if then subsisting,) unto the said E. Dunn, his heirs and assigns, or as he or they shall in that behalf order or direct, free from all incumbrances whatsoever, made, done, or committed by the said [mortgagee], his heirs, executors, administrators, or assigns, or any of them, so as for doing hereof the said [mortgagee], his heirs, executors, administrators, or assigns, or any of them, be not compelled or obliged to go or travel from the place or places of his, their, or any of their usual abode or dwelling; AND the said E. Dunn doth hereby for himself, his heirs, executors, and administrators, covenant, promise and agree with and to the said [mortgagee], his executors, administrators, and assigns, That he the said E. Dunn, his heirs, executors, or administrators, shall and will well and truly pay or cause to be paid unto the said [mortgagee], his executors, administrators, or assigns, the aforesaid sum of 1575*l.* in the parts, shares, or proportions, and on or at the days or times in the aforesaid proviso or agreement mentioned or appointed for payment thereof, without any deduction or abatement whatsoever, (except as aforesaid,) according to the true intent and meaning of these presents; PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, (c) that if the said E. Dunn, his heirs, executors, administrators, or assigns, or some or one of them, shall not well and truly pay or cause to be paid unto the said [mortgagee], his executors, admi-

Covenant for payment of mortgage money.

Power for mortgages to sell the estate.

(c) Where a security is made by way of mortgage with a power of sale, the donee of the power is a trustee within the rule which prohibits the purchase of trust property by the trustee. *Downes v. Grazebrook*, 3 Mer. 200.

Where a mortgagor remains in possession and the money is not repaid on the day stipulated, the mortgagee, who has a power of entry and sale on nonpayment, may eject the mortgagor without notice to quit or demand of possession. *Doe d. Fisher v. Giles*, 5 Bing. 421.

Where a mortgagee of a bankrupt's estate, with a power of sale, put up the premises for sale, and then applied for leave to bid, it was held that he could not be permitted to do so, unless he waived the power, and the property were sold under the order of the Commissioners. *Ex parte Davis*, 1 Mont. & Ayr. 89.

In cases like the present it will often be advisable to convey the estate to a trustee upon the usual trusts for sale in case the mortgage money be not paid.

nistrators, or assigns, the aforesaid sum of 1575*l.*, in the parts, shares, and proportions, and on or at the days or times hereinbefore appointed for the payment thereof, and the said [mortgagee], his executors, administrators, or assigns, shall by any writing or writings under his or their hand or hands, give notice to the said E. Dunn, his executor, administrators or assigns, to pay the said sum of 1500*l.* and interest, or so much thereof respectively as shall be then due and owing on the security of these presents, or leave such notice at his or their usual place or places of abode, and the said E. Dunn, his heirs, executors, administrators, or assigns, shall not within the space of six calendar months after such notice, well and truly pay or cause to be paid to the said [mortgagee], his executor, administrators, or assigns, the said sum of 1500*l.* and interest, or so much thereof respectively as shall be then due and owing on the security of these presents; Then and in such case and immediately thereupon, or at any time or times thereafter, (whether the said [mortgagee], his executors, administrators, or assigns, shall or shall not have accepted payment of any interest for the said sum of 1500*l.* or any part thereof, after such default shall have happened as aforesaid) it shall and may be lawful to and for the said [mortgagee], his heirs, executors, administrators, or assigns, either with or without the consent of the said E. Dunn, his heirs, issue, or assigns, or any other person, to make sale and dispose of (subject to the estate for life of the said D. Dunn, if then subsisting,) the said messuages, lands, hereditaments, and premises hereby bargained and sold, or expressed and intended so to be, or any of them, or any part or parts thereof, with their rights, members, and appurtenances in fee-simple, either entirely and together, or in parcels, and either by public sale or auction, or by private contract, unto any person or persons who shall be willing to become the purchaser or purchasers thereof, for the most money and best price or prices that can be reasonably had and gotten for the same, and with power to buy in the same premises or any of them, or any part or parts thereof, at any sale or sales by auction, and to resell the same without being liable for any loss which may be occasioned thereby; (c) And that for effectuating any such sale or sales, it shall and may be lawful to and for the said [mortgagee], his heirs, executors, administrators, or assigns respectively, to make, do, and execute

(c) This power of buying in the property is added to protect the mortgagee. *Ex parte Lewis*, 1 Gl. & Jam. 69.

all such acts, deeds, conveyances and assurances in the law, as to him or them shall seem reasonable; AND it is hereby agreed and declared between and by the said parties to these presents, and their true intent and meaning are, that all such acts, deeds, conveyances, and assurances, as shall be made, done and executed by the said *mortgagee*], his heirs, executors, administrators or assigns, or for the benefit of the purchaser or purchasers of the said messuages, lands, hereditaments, and premises hereby bargained and sold, or expressed and intended so to be, or any of them, or any part or parts thereof, shall, whether he said E. Dunn, his heirs, issue, or assigns, or any other persons or persons, shall or shall not join or concur herein, or consent thereto, be valid and effectual in the law, to all intents and purposes whatsoever, and such purchaser or purchasers and all and every person or persons claiming by, from, through, or under or in trust for him, her, them, or any of them, shall be entitled to have, hold, and enjoy the messuages, lands, hereditaments, and premises which shall be so sold, conveyed, or assured to or for the benefit of such purchaser or purchasers respectively, by the said *[mortgagee]*, his heirs, executors, administrators, or assigns, as against the said E. Dunn, his heirs, issue, and assigns, and all and every other person or persons claiming or to claim by, from, through, under, or in trust for him, them, or any of them, and also as against all persons whose estates, under and by virtue of the limitations contained in the said recited indenture of release, are to take effect after the determination or in defeasance of the estate tail of the said E. Dunn, of and in the said premises: AND it is hereby also agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the said *[mortgagee]*, his heirs, executors, administrators, or assigns, shall be a good and effectual discharge, or good and effectual discharges, to the purchaser or purchasers of the said messuages, lands, hereditaments, and premises, or any of them, for the money therein mentioned and acknowledged to be received, and that such purchaser or purchasers paying the same to the said *[mortgagee]*, his heirs, executors, administrators, or assigns, and taking such receipt or receipts, shall not be answerable or accountable for the loss, misapplication, or nonapplication of the money which in and by such receipt or receipts shall be mentioned or expressed to be received as aforesaid: And that it shall not be necessary for any purchaser or purchasers to ascertain that such previous notice in writing shall have

been delivered or left as aforesaid, nor to inquire as to the necessity or expediency of any such sale, or whether such default in payment as aforesaid shall have been made: AND FURTHER it is hereby agreed and declared between and by the said parties to these presents, that the said [*mortgagee*], his heirs, executors, administrators, and assigns, shall stand and be possessed of and interested in all and every the sums and sum of money to arise by any such sale or sales as shall be made of the said messuages, lands, hereditaments, and premises, or any of them, under the power hereinbefore in that behalf contained, upon the trusts and for the intents and purposes hereinafter mentioned, (that is to say): UPON TRUST, in the first place, by, with, and out of the same money to retain and reimburse himself or themselves respectively the said principal sum of 1500*l.* and interest, or so much thereof respectively as shall be then due or owing on the security intended to be made by these presents, and also all such costs, charges, and expenses as he or they respectively shall or may bear, pay, expend, sustain, or be put unto, in or about such sale or sales, or in anywise relating thereto, or to the trusts hereby declared, and to render and pay the surplus (if any) of the said sum or sums of money unto the said E. Dunn, his executor, administrators, or assigns, for his or their proper use and benefit, as part of his or their personal estate: PROVIDED ALSO, that the said [*mortgagee*], his heirs, executors, administrators, and assigns, shall, notwithstanding the power of sale hereinbefore contained and concurrently therewith, have all the rights and remedies, by foreclosure or otherwise, of a mortgagee in ordinary cases: (f) AND the said E. Dunn doth for himself, his heirs, executor, and administrators, covenant, promise, grant, and agree with and to the said [*mortgagee*], his heirs and assigns, by these presents, in manner following, (that is to say,) that he the said E. Dunn is, at the time of the sealing and delivery of these presents, lawfully and rightfully seised of or entitled to an estate of inheritance in fee tail in remainder expectant on the decease of the said D. Dunn, of and in the said messuages, lands, hereditaments, and premises hereby bargained and sold, or expressed and intended so to be, with their appurtenances, without any condition, trust, power of revocation, or limitation of any

Right of foreclosure, &c. not to be affected by power of sale.

Covenants for title by mortgageor.

(f) It seems that a proviso of this kind is valid. *Ex parte Hodgson*, 1 Gl. & Jam. 12.

so or uses, or other restraint, cause, matter, or thing whatsoever, to alter, change, charge, incumber, lessen, determine, defeat, or make void the same estate; and hat he the said E. Dunn now hath in himself, with the consent of the said D. Dunn, so given as aforesaid, good right, full power, and lawful and absolute authority to rant, bargain, sell, dispose of, and convey all the said messuages, lands, hereditaments, and premises hereby bargained and sold, or expressed and intended so to be, with their appurtenances, unto and to the use of the said [mortgagee], his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: AND ALSO that if default shall be made in the payment of the said sum of 1575*l*. or any part thereof, contrary to the aforesaid proviso or agreement for payment of the same, and the true intent and meaning of these presents, then and in such case it shall and may be lawful to and for the said [mortgagee], his heirs or assigns, at any time or times thereafter and after the decease of the said D. Dunn, into and upon all and every the said messuages, lands, hereditaments, and premises hereby bargained and sold, or expressed and intended so to be, or any of them, or any part or parts thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy, and enjoy, and receive and take the rents, issues, and profits thereof, to and for his and their own use, without any let, trouble, interruption, or disturbance whatsoever, of, from, or by the said E. Dunn, his heirs, issue, or assigns, or any other person or persons whomsoever, any estate, right, title, or interest, having or lawfully or equitably claiming, or to have or lawfully or equitably claim in or to the said messuages, hereditaments, and premises, or any of them, or any part or parts thereof (save and except the estate for life of the said D. Dunn, and such leases as shall have been granted by him in pursuance of the power for that purpose given to him by the said recited indenture of release): AND that free and clear, and freely and clearly and absolutely acquitted, exonerated, and discharged or otherwise by the said E. Dunn, his heirs, executors, or administrators, saved, protected, kept harmless, and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, right and title of dower, mortgages, uses, wills, entails, annuities, rent charges, rent seek, and arrears of rent, fines, issues, amerciaments, statutes, recognizances, judgments, executions, extents, seizures, sequestrations,

For quiet
enjoyment
after default.

Free from in-
cumbrances.

For further
assurance.

and all other estates, titles, troubles, charges, and incumbrances whatsoever, (except the estate for life of the said D. Dunn and such leases as aforesaid). AND MOREOVER that if default shall be made of or in payment of the aforesaid sum of 1575*l*. or any part thereof, contrary to the aforesaid proviso and covenant for the payment of the same, and the true intent and meaning of these presents, then and in such case he the said E. Dunn and his heirs and issue, and all and every other persons and person whomsoever having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or interest, of, in, or to the said messuages, lands, hereditaments, and premises hereby bargained and sold, or expressed and intended so to be, or any of them, or any part or parts thereof (save and except the said D. Dunn in respect of his life estate, and the persons intitled for the time being to such leases as are hereinbefore excepted in respect thereof) shall and will from time to time and at all times thereafter, upon the request of the said [*mortgagee*], his heirs, executors, administrators, or assigns, but at the costs and charges of the said E. Dunn, his heirs, executors, or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, matters, things, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely granting, conveying, and assuring all the said messuages, lands, hereditaments, and premises hereby bargained and sold, or expressed and intended so to be, with their appurtenances, unto and to the use of the said [*mortgagee*], his heirs and assigns for ever, free from all incumbrances except as before excepted, as by the said [*mortgagee*], his heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required: PROVIDED ALSO, and it is hereby agreed and declared between and by the said [*mortgagee*] and the said E. Dunn, and the true intent and meaning of them and of these presents nevertheless further are, that after the decease of the said D. Dunn it shall and may be lawful to and for the said E. Dunn, his heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said messuages, lands, hereditaments, and premises hereby bargained and sold, or expressed and intended so to be, with their appurtenances, and to receive and take the rents, issues, and profits thereof to his and their own use, until default shall be made in payment of

Proviso for
mortgagor's
enjoyment
until default.

said sum of 1575*l.* or some part thereof, contrary to aforesaid proviso or covenant for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said [mortgagee], his heirs assigns, or by any other person or persons whomsoever fully claiming or to claim by, from, or under him, him, or any of them. IN WITNESS, &c. (h)

(h) This deed must be enrolled in Chancery within six calendar months after its execution ; see *ante*, 330, s. 41.

NO. XVII.

ARGAIN AND SALE of Freehold and Copyhold Estates, of which a Bankrupt was Tenant in Tail in Possession, by the Commissioner of the Court of Bankruptcy acting under a Fiat and ASSIGNMENT of Leaseholds by the Assignees of the Bankrupt, who concurs and enters into Covenants with the Purchaser. (See 3 & 4 Will. 4, c. 74, ss. 56, 66 ; pp. 346, 354.)

THIS INDENTURE, made the — day of —, in the year of our Lord 18—, between Edward Holroyd, esq., the Commissioner of her majesty's Court of Bankruptcy, acting under the fiat in bankruptcy awarded and issued against [name and description of bankrupt] of the first part ; A. B. of &c., the official assignee of the estate and effects of the said [bankrupt] of the second part ; C. D. of &c. and E. F. of &c., assignees of the estate and effects of the said [bankrupt], chosen as hereinafter mentioned, of the third part ; the said [bankrupt] of the fourth part ; and the [purchaser] of the fifth part ; (a) WHEREAS [testator] being at the time of the execution of his will hereinafter recited, and thenceforth without intermission until his decease, seised of an estate of inheritance in fee simple of and in (amongst other hereditaments) the freehold messuage, lands, and hereditaments hereinafter described,

Recital of will devising freehold and copyhold estates to the bankrupt in tail.

(a) It is usual for the bankrupt to concur in the conveyance of his estate to a purchaser, and to enter into covenants for title, &c. ; and by 6 Geo. 4, c. 16, s. 78, the bankrupt may be ordered to join in such conveyance, which, if not executed by him within the time directed by the order, will bind him and those claiming under him. (See *Ex parte Thomas*, 1 M. & M. 64 ; 2 Gl. & J. 279.)

Death of testator.

Admission of bankrupt to copyholds.

Lease to bankrupt.

Fiat in bankruptcy.

Choice of official assignee.

and of and in the copyhold hereditaments hereinafter described, for an estate of inheritance, according to the custom of the manor of Dale, in the county of —, duly made, signed, and published his last will and testament in writing, bearing date the 6th day of April, 1830, executed and attested in such manner as was by law then required for rendering valid devises of freehold estates, and thereby gave and devised all and every the messuages, lands, tenements, and hereditaments of his the said [testator], whether freehold, copyhold, or of any other tenure, situate, lying, and being in the parish of —, in the county of —, unto the said [bankrupt] and the heirs of his body lawfully begotten, with divers remainders over: AND WHEREAS the said [testator] departed this life on the 1st day of June, 1831, without having altered or revoked his said will: AND WHEREAS, at a court held in and for the said manor of Dale, on the 1st day of May, 1832, the said [bankrupt] was admitted tenant under and by virtue of the said recited will of the said [testator], to the pieces or parcels of copyhold land and hereditaments hereinafter described, to hold to him the said [bankrupt] and the heirs of his body, according to the form and effect of the said recited will, by copy of court roll, at the will of the lord, according to the custom of the said manor: AND WHEREAS by an indenture bearing date on or about the 1st day of March, 1830, and made, or expressed to be made, between [lessor] of the one part, and the said [bankrupt] of the other part, in consideration of the rent and covenants thereinafter reserved and contained, and on the part of the said [bankrupt] to be paid and performed, the said [lessor] did demise, lease, and to farm let unto the said [bankrupt], his executors, administrators, and assigns, ALL that messuage, &c. [description of parcels in lease]: To hold the same unto the said [bankrupt], his executors, administrators, and assigns, from the day of the date of the indenture now in recital, for and during and unto the full end and term of forty years, subject to the payment of the yearly rent of 80*l.*, and to the performance and observance of the provisoes, covenants, conditions, and agreements in the indenture now in recital contained, and on the part of the said [bankrupt], his executors, administrators, and assigns, to be observed and performed: AND WHEREAS a fiat of bankruptcy was on the — day of — issued against the said —, directed to the said Edward Holroyd, under which the said [bankrupt] was duly adjudged to have become a bankrupt: AND WHEREAS,

t a sitting of the said E. Holroyd, the Commissioner of
 he said Court of Bankruptcy, acting under the said *fiat*,
 held on the 4th day of February last past, the said E.
 Holroyd did constitute and appoint the said A. B. to be
 the official assignee of the estate of the said [bankrupt],
 to act with the assignee or assignees to be chosen by the
 creditors of the said [bankrupt]: AND WHEREAS at another Choice of as-
signees.
 sitting of the said E. Holroyd, held on the — day of
 — last past, the day fixed by notice in the London
 Gazette for the choice of an assignee or assignees of the
 estate and effects of the said [bankrupt], the major part
 in value of the creditors of the said [bankrupt] then pre-
 sent, who had proved their debts to the amount of 10*l*.
 and upwards, did nominate and choose the said C. D. and
 E. F. to be the assignees of the estate and effects of the
 said [bankrupt], and the said E. Holroyd did confirm
 such choice, and appoint the said C. D. and E. F. to be
 such assignees accordingly; AND WHEREAS the said Sale of bank-
rupt's estates.
 [assignees] caused the freehold, copyhold, and leasehold
 estates of or to which the said [bankrupt] was seised,
 possessed, or entitled, at the time he became a bankrupt,
 to be put up for sale by public auction, pursuant to notice
 for that purpose given in the London Gazette and other
 public papers, in six distinct lots, on the — day of —
 now last past, at the Crown Inn, situate in —, subject
 to certain conditions annexed to the printed particulars of
 sale then and there produced, and at such sale the said
 [purchaser], by himself or his agent, was the highest bidder
 for, and declared to be the purchaser of, lot 1, comprising
 the freehold hereditaments hereinafter described, at the
 sum of 1000*l*.; of lot 2, comprising the copyhold heredita-
 ments hereinafter described, at the sum of 800*l*.; and of
 lot 3, comprising the said leasehold premises, at the sum of
 500*l*.; NOW THIS INDENTURE WITNESSETH, that for carrying FIRST TES-
TATUM.
Conveyance
of freeholds.
 the said recited sale and purchase into effect, so far as
 relates to the said freehold hereditaments, and for and
 in consideration of the sum of 1000*l*. of lawful money of
 Great Britain to the said [official assignee] in hand well
 and truly paid by the said [purchaser] at or immediately
 before the sealing and delivery of these presents, in full
 for the absolute purchase of the freehold messuage, lands
 and hereditaments hereinafter described and intended to
 be hereby bargained and sold, or otherwise assured, and
 the fee simple and inheritance thereof, free from all in-
 cumbrances, the receipt of which said sum of 1000*l*. he
 the said [official assignee] doth hereby admit and acknow-
 ledge, and of and from the same and every part thereof,

the said [official assignee] and also the said [assignees] and [bankrupt] do, and each and every of them doth acquit, release and discharge the said [purchaser], his heirs, executors, administrators, and assigns, and every of them, for ever by these presents, and also in consideration of the sum of 5s. of like lawful money, to each of them the said E. Holroyd [assignees] and [bankrupt] in hand paid by the said [purchaser] at or before the execution hereof, the several receipts whereof are hereby acknowledged, he the said E. Holroyd, in further pursuance and execution of the said *fiat* and of the several statutes now in force concerning bankrupts, and particularly under and by virtue and in pursuance of the powers and provisions given by and contained in an act of parliament, passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled, "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," HATH granted, bargained, sold, disposed of, conveyed and assured, and by these presents DOth, to the full extent of the power vested in him as such commissioner as aforesaid, grant, bargain, sell, dispose of, convey, and assure; and the said [assignees] and [bankrupt] HAVE, and each and every of them HATH, granted, bargained, sold, remised, released, and confirmed, and by these presents do, and each and every of them DOth grant, bargain, sell, remise, release, and confirm unto the said [purchaser] and his heirs, all that &c. [*Description of freehold estate, general words, the reversion, &c. and all the estate, &c. ante, p. 572.*] To HAVE AND TO HOLD the messuage, land, and all and singular other the hereditaments and premises hereinbefore bargained and sold, or otherwise assured, or expressed and intended so to be, with their appurtenances, unto the said [purchaser], his heirs and assigns, To the only use and behoof of the said [purchaser], his heirs and assigns, for ever. And the said [purchaser] hereby declares, that if he shall die leaving a widow, such widow shall not be entitled to dower out of and in the hereditaments and premises hereinbefore bargained and sold or otherwise assured or expressed and intended so to be, or out of, or in, any part or parts thereof. AND THIS INDENTURE FURTHER WITNESSETH, (b) that for carrying the

Habendum.

To purchaser
in fee.

SECOND
TESTATUM.

(b) In order to save expense in the enrolment of a deed of this kind, it will be found convenient in some cases to take the conveyance of the copyholds by a separate instrument. In

aid sale and purchase into effect, so far as relates to the copyhold hereditaments hereinafter described, and for and in consideration of the sum of 800*l.* of lawful money of Great Britain to the said [official assignee] in hand well and truly paid by the said [purchaser] at or immediately before the sealing and delivery of these presents, in full for the absolute purchase of the pieces or parcels of land hereinafter described and intended to be hereby bargained and sold or otherwise assured, and the fee simple and inheritance thereof, according to the custom of the manor aforesaid, free from all incumbrances, the receipt of which said sum of 800*l.* he the said [official assignee] doth hereby admit and acknowledge, and of and from the same and every part thereof the said [official assignee], and also the said [assignees] and [bankrupt], do, and each and every of them doth, acquit, release, and discharge the said [purchaser], his heirs, executors, administrators, and assigns, and every of them, for ever, by these presents, and also in consideration of the sum of 5*s.* of like lawful money to each of them the said E. Holroyd and [assignees] and [bankrupt] paid at the same time by the said [purchaser], the several receipts whereof are hereby acknowledged, he the said E. Holroyd, in further pursuance and execution of the said fiat, and the several statutes now in force concerning bankrupts, and particularly under and by virtue and in pursuance of the powers and provisions of the said act of parliament of the third and fourth years of the reign of King William the Fourth, HATH granted, bargained, sold, disposed of, conveyed, and assured, and by these presents DOth, to the full extent of the power vested in him as such commissioner as aforesaid, grant, bargain, sell, dispose of, convey, and assure, and the said [assignees] and also the said [bankrupt] HAVE, and each and every of them HATH, granted, bargained, sold, remised, released, and confirmed, and by these presents do, and each and every of them DOth grant, bargain, sell, remise, release, and confirm unto the said [purchaser] and his heirs, ALL THAT, &c. [Description of parcels of copyhold land,] AND all timber and other trees, hedges, ditches, mounds, fences, ways, waters, watercourses, rights, easements, privileges, and appur-

Conveyance
of copyhold.

General
words.

such case the covenants for the title to the copyholds may be either inserted in the conveyance of the copyholds or in the deed conveying the freeholds; but if the latter plan be adopted, the conveyance of the copyholds should be shortly recited in the other deed.

tenances whatsoever to the said pieces or parcels of copyhold land hereby bargained and sold, or otherwise assured, or expressed and intended so to be, belonging, or in anywise appertaining or used or enjoyed therewith, or accepted, reputed, or deemed as part or parcel thereof, or of any part thereof: And the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof: And all the estate, right, title, interest, use, trust, property, claim and demand whatsoever at law and in equity of the said E. Holroyd, [assignees] and [bankrupt] and each and every of them, in, to, and out of the same land and hereditaments, and every part thereof.

Habendum.

To HAVE AND TO HOLD the said pieces or parcels of copyhold land, and all and singular other the copyhold hereditaments and premises hereby bargained and sold, or otherwise assured, or expressed and intended so to be, unto and to the use of the said [purchaser] his heirs and assigns, for ever. To the intent that the said [purchaser], or his heirs may be admitted tenant or tenants of the said copyhold hereditaments, to hold the same by the ancient rents, customs, and services therefore due and of right accustomed to be paid and performed: AND THEN INDENTURE LASTLY WITNESSETH, (c) that for carrying the said sale and purchase into effect, so far as relates to the said leasehold premises, and for and in consideration of the sum of 500*l.* of lawful money of Great Britain, to the said [official assignee] in hand well and truly paid by the said [purchaser] at or immediately before the sealing and delivery of these presents, the receipt of which said sum of 500*l.* the said [official assignee] doth hereby admit and acknowledge, and of and from the same and every part thereof he the said [official assignee] and 'also the said [assignees] and [bankrupt] do, and each and every of them doth, acquit, release, and discharge the said [purchaser], his executors, administrators, and assigns, and every of them, for ever by these presents, they the said [assignees] HAVE, and each of them HATH, bargained, sold, assigned, transferred, and set over, and by these presents do, and each of them DOETH, bargain, sell, assign, transfer, and set over, and the

THIRD
TESTATUM.
Assignment
of leaseholds.

(c) Where there is a sufficient reason for having the evidence of the title to the leaseholds distinct from that to the freehold and copyhold, as in the case of renewable leases for lives or years, it will be advisable for the purchaser to take an assignment of the lease by a separate deed.

[*bankrupt*] hath granted, bargained, sold, assigned, confirmed, and by these presents doth grant, bargain, assign, and confirm unto the said [*purchaser*], his executors, administrators, and assigns, the said messuage, ~~is~~, and all and singular other the premises mentioned, ~~described~~ and comprised in the said hereinbefore in part ~~of~~ indenture of lease, and thereby demised, or expressed and intended so to be, with their and every of ~~its~~ appurtenances, and all the estate, right, title, interest, term and terms for years yet to come and unexpired therein, trust, possession, property, possibility, claim, demand whatsoever, as well legal as equitable, of ~~in~~ the said [*assignees*] and [*bankrupt*], and each and every of them, of, in, to, or out of the same premises, ~~any~~ or any part or parcel thereof, To HAVE AND TO Habenium.
~~And~~ the said messuage, lands, and all and singular other ~~of~~ premises hereinbefore assigned, or expressed and intended so to be, with their and every of their appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, for and during all the rest, residue, and remainder now to come and unexpired of the said ~~sum~~ of forty years thereof granted by the said hereinbefore in part recited indenture of lease, subject nevertheless to the payment of the yearly rent, and to the performance and observance of the covenants and agreements ~~in~~ and by the same indenture of lease reserved and contained, and henceforth on the lessee's or assignee's part of the premises to be paid, kept, done, and performed: Covenant by
commissioner
and assignees
against in-
cumbrances.
 And each and every of them the said E. Holroyd, C. D. and E. F. severally, separately, and apart from each other, and so far as concerns his own acts and deeds, but not further or otherwise, doth hereby for himself and his respective heirs, executors, and administrators, covenant and declare with and to the said [*purchaser*] his heirs, executors, administrators, and assigns, That they the said E. Holroyd, C. D. and E. F. respectively, or any or either of them, neither have nor hath at any time or times heretofore made, done, committed, or executed, or knowingly or willingly permitted or suffered, or been parties or party, or privy to any act, deed, matter or thing whatsoever, whereby or by reason or means whereof the said freehold, copyhold, and leasehold messuage, lands, hereditaments, and premises hereby respectively bargained and sold, or otherwise assured and hereinbefore assigned, or expressed and intended so to be, or any of them, or any part or parts thereof respectively, are, is, can, shall or may be impeached, charged, affected or incumbered,

Covenants by the bankrupt. in title, term, estate, or otherwise howsoever: And the said [bankrupt] for himself, his heirs, executors and administrators, doth covenant, promise and agree with

and to the said [purchaser], his heirs, executors, administrators and assigns, by these presents in manner following, (that is to say,) that for and notwithstanding any act, deed, matter or thing by him the said [bankrupt], or the said — the testator, made, done, committed or executed

Right to convey. or knowingly or willingly suffered to the contrary, They the said E. Holroyd, [assignees] and [bankrupt], or some or one of them, now have or hath in themselves or himself good right, full power, and lawful and absolute authority to bargain, sell, dispose of and confirm the

freehold and copyhold messuage, lands and other hereditaments hereinbefore bargained and sold, or otherwise assured, or expressed and intended so to be, with the appurtenances thereunto belonging, unto the said [purchaser], his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents; And also to bargain, sell, assign and assure all and singular the said messuage, lands, hereditaments and premises hereinbefore assigned, or expressed and intended so to be, with the appurtenances, unto the said [purchaser], his executors, administrators and assigns, in manner aforesaid, according

For quiet enjoyment. to the true intent and meaning of these presents: And that it shall and may be lawful to and for the said [purchaser], his heirs, executors, administrators, and assigns,

from time to time and at all times hereafter peaceably and quietly to enter into and upon, and to have, hold, occupy, possess and enjoy the said freehold and copyhold messuages and other hereditaments hereinbefore bargained and sold or otherwise assured, or expressed and intended so to be, with their appurtenances, and from time to time and at all times hereafter, during the remainder of the said term of forty years, to enter into and upon, and to have, hold, use, occupy, possess, and enjoy the said messuage, lands, and premises hereinbefore assigned, or expressed and intended so to be, and to have, receive, and take the rents, issues and profits of the same freehold, copyhold and leasehold hereditaments and premises, and every part thereof, to and for his and their own use and benefit, without the lawful let, suit, trouble, denial, eviction, interruption, claim or demand whatsoever, of or by him the said [bankrupt], or his heirs or issue, or of or by any person or persons lawfully or equitably claiming or to claim by, from, or under or in trust for him, them, or any of them, or by, from, or under the

said — the testator: AND that free and clear, and freely, clearly and absolutely acquitted, exonerated, released, and for ever discharged, or otherwise by the said [bankrupt], his heirs, executors or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, right and title of dower, uses, trusts, entails, wills, statute merchant or of the staple, recognizances, judgments, executions, rents, arrears of rent, annuities, legacies, sums of money, yearly payments, forfeitures, re-entries, cause and causes of forfeiture and re-entry, debts of record, debts due to the king's majesty, and of, from and against all other estates, titles, troubles, charges, debts, and incumbrances, either already had, made, executed, occasioned or suffered, or hereafter to be had, made, executed, occasioned or suffered by the said [bankrupt] or his heirs or issue, or by any person or persons lawfully or equitably claiming or to claim by, from, or under or in trust for him, them, or any of them, or by the said — the testator, or any person claiming under him, (subject only as to the said copyhold premises, to the rents, customs, and services therefore due, and of right accustomed to be paid and performed, and subject only as to the said messuage, lands and premises hereinbefore assigned, or expressed and intended so be, to the payment of the rent, and to the performance of the provisions, covenants and agreements in and by the said hereinbefore in part recited indenture of lease reserved and contained on the lessee's or tenant's part of the same premises henceforth to grow due, and to be performed, fulfilled and kept:) AND FURTHER, that the said [bankrupt] and his heirs and issue, and all and every other persons and person having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to or out of the said freehold and copyhold messuage, lands and other hereditaments hereinbefore bargained and sold or otherwise assured, or expressed and intended so to be, or in, to, or out of the said messuage, lands and premises hereinbefore assigned, or expressed and intended so to be, or any of them, or any part thereof, by, from, or under, or in trust for him the said [bankrupt], or his heirs or issue, or by, from, or under the said — the testator, shall and will from time to time and at all times hereafter, upon every reasonable request to be made for that purpose by and

Free from incumbrances.

For further assurances.

at the proper costs and charges in the law of the said [purchaser], his heirs, executors, administrators, or assigns, make, do, acknowledge and execute, or cause and procure to be made, done, acknowledged and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, conveyances and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying and assuring the said freehold and copyhold messuage, lands and other hereditaments hereinbefore bargained and sold or otherwise assured respectively, or expressed and intended so to be, and every part thereof, with their appurtenances, unto and to the use of the said [purchaser], his heirs and assigns for ever: And also for the further and better, more perfectly and absolutely assigning and assuring the said messuage, lands, hereditaments and premises, hereinbefore assigned, or expressed and intended so to be, with their and every of their appurtenances, unto the said [purchaser], his executors, administrators and assigns, for and during all the rest, residue and remainder which shall be then to come and unexpired of the said term of forty years, therein granted by the said hereinbefore in part recited indenture of lease (subject as aforesaid): As by the said [purchaser], his heirs, executors, administrators or assigns, or his or their or any of their counsel in the law, shall be lawfully and reasonably devised or advised and required, so as such further assurances contain in them or imply no further or other covenants than against the person or persons who shall be requested to make and execute the same, and against his and their own acts and deeds respectively, and so as no person shall be compelled or compellable to travel or go from the place of his or her usual abode for the doing thereof. IN WITNESS, &c. (d)

(d) It seems that, on the sale of a lease by the assignees of a bankrupt, neither the assignees nor bankrupt are entitled to require the usual covenant from the purchaser for the payment of the rent and performance of the covenants reserved and contained in the original lease; *Wilkins v. Fry*, 1 Mer. 244; see 6 Geo. 4, c. 16, s. 75.

This deed must be enrolled in Chancery within six calendar months after its execution, and entered on the court rolls of the manor. (See *ante*, p. 349, s. 59.)

No. XVIII.

CONVEYANCE for barring an Equitable Entail affecting an Estate which had been directed to be sold, and the Produce invested in the Purchase of other Lands to be entailed, by the Party who would have been Tenant in Tail of the Lands to be purchased, and by the Heir at Law of the surviving Trustee for Sale. (See 3 & 4 Will. 4, c. 74, s. 71, ante, p. 358.)

THIS INDENTURE, made the — day of —, A. D. Parties.

18—, between C. Crow, of &c., esq., the eldest son of F. Crow, late of &c., esq., deceased, of the first part;

F. Daw, of &c. the eldest son and heir at law of M. Daw, late of &c. the surviving trustee, named in the indentures

of lease and release hereinafter recited, of the second

part; and [releasee] of the third part: WHEREAS by indentures of lease and release, bearing date respectively

on or about the 6th and 7th days of June, 1811, the release being made or expressed to be made between

[parties], the messuages, lands and hereditaments hereinafter described, and intended to be hereby granted and

released, were duly conveyed and assured unto and to the use of the said M. Daw and A. B., their heirs and

assigns for ever, in trust to sell and dispose of the same hereditaments in manner therein mentioned: And by the

said indenture of release it was declared and agreed that the said [trustees], their heirs, executors, administrators,

and assigns, should stand and be possessed of, and interested in, the sum or sums of money to arise or be

produced by the sale or sales which should be made in pursuance of the trusts of the same indenture, and also of

and in the rents, issues and profits of the said messuages, lands and hereditaments, in the meantime and until the

same should be sold, upon and for such trusts, intents, and purposes, and with, under, and subject to such

powers, provisos, agreements and declarations as were or should be expressed, declared, and contained of and concerning the same, in and by an indenture therein mentioned to be then already prepared and ingrossed, and to

bear or intended to bear even date with the indenture now in recital, and to be made or intended to be made

between the persons therein named, being the same persons who are parties to the indenture of release next

Recital of conveyance of estates to trustees upon trust to sell.

Recital of
settlement of
other real
estates.

Declaration
of trusts of
money to
arise from
sale of estates
directed to be
sold.

hereinafter recited: AND WHEREAS by indentures of lease and release bearing date respectively on or about the 6th and 7th days of June, 1811, the release being made or expressed to be made between [parties], divers manors, messuages, lands, and other hereditaments in the county of —, therein particularly mentioned and described, were duly conveyed and assured, to the use of the said J. Crow and his assigns, during the term of his natural life, with remainder to the said [trustees] and their heirs during the life of the said J. Crow, upon trust, by the usual means to preserve the contingent remainders thereafter limited, with remainder to the use of the first and other sons of the said J. Crow successively in tail, with divers remainders over: AND by the indenture of release now in recital (being the indenture referred to by the hereinbefore recited indenture of release) it was declared that the said [trustees], their heirs, executors, administrators, and assigns respectively should stand and be possessed of, and interested in, all and every the sums and sum of money to arise or be produced by the sale or sales which might be made of the messuages, lands, hereditaments, and premises comprised in the said therein and hereinbefore in part recited indenture, or any part thereof, in pursuance of the trusts of the same indenture in that behalf declared, upon trust that they the said [trustees], or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, should lay out and invest the same in the purchase of messuages, lands or hereditaments, in fee simple in possession in England or Wales, of a clear and indefeasible estate of inheritance, and settle and assure, or cause to be settled and assured, the lands and hereditaments so to be purchased, to such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisoes, conditions and agreements as were in and by the indenture now in recital limited, expressed, declared, and contained of and concerning the manors, hereditaments, and premises thereby released or intended so to be, or as near thereto as the deaths of parties and other intervening accidents would then admit: And it was by the indenture now in recital declared, that the rents, issues, and profits of the hereditaments comprised in the said first hereinbefore recited indenture of release, or of such part or parts thereof as should for the time being remain unsold, should in the meantime and until the same should be sold, in pursuance

of the trusts aforesaid, belong and be paid to such and he same person or persons as would for the time being, under the trusts thereinbefore declared, have been entitled to receive the rents, issues, and profits of the hereditaments directed to be purchased with such monies, in case such purchase or purchases and settlement as aforesaid had then been actually made: AND WHEREAS the said J. Crow departed this life on or about the — day of —, leaving the said C. Crow his eldest son and heir in tail: AND WHEREAS the said C. Crow, who, as the eldest son of the said J. Crow, would, under and by virtue of the said secondly hereinbefore recited indenture of release, be entitled to the lands and hereditaments by the same indenture directed to be purchased with the money to arise from the sale of the said messuages, lands, and hereditaments by the said first hereinbefore recited indenture of release directed to be sold, for an estate tail in possession, in case the same hereditaments were sold, and such purchase and settlement were made and executed, as by the said secondly hereinbefore recited indenture of release is directed, hath elected to take the hereditaments so directed to be sold, in lieu of the lands and hereditaments by the same indenture directed to be purchased with the money to arise from such sales as aforesaid; and the said C. Crow being by virtue of the trusts contained in the same indenture, and the election he hath so made as aforesaid, entitled to the same hereditaments for an equitable estate tail in possession, is desirous of barring and extinguishing all equitable estates tail and remainders and reversions thereupon expectant and depending of and in the same hereditaments, and for that purpose has determined to make and execute such conveyance and assurance as is hereinafter contained: AND WHEREAS the said M. Daw survived the said A. B. his co-trustee, and the said M. Daw departed this life on or about the — day of — now last past, having made and published his last will and testament in writing, but such will does not contain any particular or general devise of the hereditaments comprised in the first hereinbefore recited indenture of release, and so vested in him as surviving trustee as aforesaid, and therefore, upon his decease, the legal estate in the same hereditaments descended to and became vested in the said J. Daw as the eldest son and heir at law of the said M. Daw: AND WHEREAS the said J. Daw, on the request of the said C. Crow, has agreed to join in the conveyance hereinafter contained, for the purpose of passing the legal

Death of
tenant for
life.

That party
entitled to
lands to be
purchased
had elected
to take lands
directed to be
sold.

Death of
trustees.

Agreement of
heir of trustee
to convey.

TESTATUM.
Conveyance
by tenant in
tail and trustee.

estate in the hereditaments hereinafter described, now vested in him as the heir at law of the said M. Daw, the surviving trustee as aforesaid: NOW THIS INDENTURE WITNESSETH, that in order to defeat all estates tail of the said C. Crow of and in the messuages, lands, and hereditaments hereinafter described, and intended to be hereby granted and released, and all remainders, reversions, estates, rights, interests, and powers, to take effect after the determination or in defeasance of such estates tail, and for limiting and assuring the same premises unto and to the use of the said C. Crow, his heirs, and assigns for ever, and in consideration of the sum of 5s. of lawful money of Great Britain to each of them the said C. Crow and J. Daw, in hand paid by the said [releasee] at or before the sealing and delivery of these presents, the several receipts whereof are hereby acknowledged, he the said C. Crow, under and by virtue and in pursuance of the powers and provisions given by and contained in an act of parliament passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," HATH granted, aliened, disposed of, released and confirmed, and by these presents made in pursuance of the statute passed in the session of parliament held in the fourth and fifth years of the reign of her majesty Queen Victoria, intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties," BOTH grant, alien, dispose of, release and confirm, and the said J. Daw (a) (at the request and by the direction of the said C. Crow, testified by his being a party to and sealing and delivering these presents,) HATH released and confirmed, and by these presents so made in pursuance of the said last mentioned act of parliament as aforesaid, BOTH release and confirm unto the said [releasee]: ALL THAT, &c. (*Description of estate, general words, reversion, &c. and all the estate, &c. ante, p. 572.*) TO HAVE AND TO HOLD the said messuages and lands, and all and singular other the hereditaments and premises hereby granted and released, or expressed and intended so to be,

Habendum.

(a) It seems that until the entail is barred, the trustee would not be justified in conveying the legal fee to the tenant in tail, but only an estate commensurate with the interest of the latter. See *Short v. Wood*, 1 P. Wms. 470, and the cases cited in 1 Atk. 12, 3d edit.

ith their and every of their appurtenances, unto the said *releasee*] and his heirs: To the only use and behoof of the said C. Crow, his heirs and assigns for ever, freed and absolutely discharged of and from all estates tail, and all remainders and reversions expectant or depending thereupon, and all collateral limitations thereunto annexed, and all the trusts, estates, and interests created, limited or declared, or directed to be created, limited or declared, in and by the said hereinbefore recited indentures of release, or either of them: AND the said J. Daw doth hereby for himself, his heirs, executors, and administrators, covenant and declare with and to the said [*releasee*], his heirs and assigns, that he the said J. Daw hath not at any time heretofore made, done, committed or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter or thing whatsoever, whereby or by reason or means whereof the said messuages, lands, and other hereditaments hereby granted and released, or expressed and intended so to be, or any of them, or any part thereof, are, is, can, shall or may be impeached, charged, affected or incumbered in title, estate or otherwise howsoever. IN WITNESS, &c.(b)

Covenant
against in-
cumbrances.

(b) This deed must be inrolled in Chancery within six calendar months after its execution. (See *ante*, pp. 330, 359.)

No. XIX.

Assignment of Stock, subject to be invested in the Purchase of Lands to be entailed, by the Persons who would have been Tenant for Life in Possession and Tenant in Tail in Remainder of such Lands, if purchased, for the purpose of discharging the Stock from the Trusts to which it was subject. (See ante, p. 358—360.)

THIS INDENTURE, made the — day of —, A. D. Parties. 18—, between William Evans, of &c. of the first part; Edward Evans, of &c., the eldest son and heir of the body of the said W. Evans, of the second part; and A. B., of &c., of the third part. WHEREAS [*recital of will devising estates to W. Evans for life, with remainder to his first and other sons successively in tail. See ante, p. 591, 592.*] And the said testator gave and bequeathed all his goods, chattels, ready money, securities for money,

Recital of will giving the residue of personal estates to trustees to be invested in

purchase of
lands, to be
limited in
strict settle-
ment.

and other personal estates and effects whatsoever unto the said [*trustees*], their executors, administrators and assigns, upon trust, that they the said [*trustees*], or the survivor of them, or the executors, administrators or assigns of such survivor, should sell and dispose of, and convert into money, all such part of his (the said testator's) personal estate as should not consist of money or government securities or mortgages upon real estates, and should stand and be possessed of and interested in the money into which the same should be so converted, and of and in such part of the same as should consist of money, government securities, or mortgages, upon trust that they the said [*trustees*], or the survivor of them, or the executors, administrators and assigns of such survivor, should by and with the same pay his (the said testator's) debts, legacies, funeral and testamentary expenses: And the said testator directed that the said [*trustees*], or the survivor of them, or the executors, administrators or assigns of such survivor, should lay out and invest all the ultimate residue and surplus of his (the said testator's) personal estate, which should remain after payment of his debts, legacies, funeral and testamentary expenses, in the purchase of freehold manors, messuages, lands or hereditaments, to be situate in the said county of Essex, with such copyhold messuages, lands, tenements or hereditaments, as might be contiguous thereto, or be convenient to be held therewith; And the said testator directed that the said [*trustees*], or the survivor of them, or the executors, administrators or assigns of such survivor, should convey, settle and assure, or cause to be conveyed, settled and assured, the real estate which should be so purchased, to such and the same uses, upon and for such and the same trusts, intents and purposes, and with, under, and subject to such and the same powers, provisos, limitations and declarations, as in and by his said will were declared or expressed of and concerning the hereditaments thereby devised as aforesaid, and which should be then subsisting undetermined or capable of taking effect, or as near thereto as the deaths of parties and other contingencies would then admit; And the said testator further declared his will to be, that until the money directed to be invested in the purchase of real estate as aforesaid should be invested in a purchase or purchases as thereinbefore directed, it should be lawful for the said [*trustees*], and the survivor of them, and the executors, administrators and assigns of such survivor, to place out and invest such money at interest

in the public funds, or in or upon government or real securities, in their or his names or name, and to alter and transpose such securities or funds as often as to them or him should seem meet, and that the dividends, interest and annual proceeds of such stocks, funds or securities should go and be payable and applicable to and for such uses, intents and purposes, as the rents and profits of the estates to be purchased therewith respectively would go and be payable and applicable, in case such purchase or purchases and settlement as aforesaid were then actually made; AND WHEREAS the said [testator] departed this life on or about the — day of —, without having altered or revoked his said will, which was duly proved by the said [trustees], the executors therein named, on the — day of —, in the Prerogative Court of the Archbishop of Canterbury: AND WHEREAS after payment and satisfaction of all the debts, legacies, funeral and testamentary expenses of the said [testator], the sum of £— remained in the hands of the said [trustees], subject to be invested in the purchase of real estates, pursuant to the directions for that purpose contained in the said recited will; AND WHEREAS the said [trustees] did not lay out and invest the said sum of £—, or any part thereof, in the purchase of lands, pursuant to the directions contained in the said recited will, but the same sum was, on or about the — day of —, invested by the said [trustees], in their names, in the purchase of the sum of 10,000*l.*, three per cent. consolidated bank annuities, which is now standing in their names in the books of the governor and company of the Bank of England, subject to the trusts of the said recited will; AND WHEREAS the said W. Evans would be tenant for life of the lands and hereditaments, by the said will directed to be purchased and settled as aforesaid, if such purchase and settlement were made, and in such case the said E. Evans would be tenant in tail in remainder expectant on the decease of the said W. Evans, of and in the same lands and hereditaments; AND WHEREAS the said W. Evans and E. Evans have agreed to concur in these presents for the purpose of discharging the said sum of 10,000*l.* three per cent. consolidated bank annuities, from the trusts of the said recited will, in manner hereinafter mentioned; AND WHEREAS the life estate or interest of the said W. Evans, of and in the dividends of the said sum of 10,000*l.* three per cent. consolidated bank annuities, has been valued at the sum of 2000*l.* like annuities, which the said W. Evans has agreed to

Testator's death, and probate of his will.

That surplus of testator's estate remained after payment of debts, &c.

Surplus of testator's personally invested in funds.

Interests of parties.

Agreement to discharge stock from trusts.

Agreement of tenant for life to accept sum in satisfaction of his interests.

TESTATUM.
Tenant for
life and re-
mainder man
assign the
stock to a
trustee.

accept in full satisfaction of all his interest or estate in the said first-mentioned sum, or any other stocks, funds or securities, in or upon which the same may be invested, or in any lands or hereditaments directed to be purchased therewith respectively: Now **THIS INDENTURE WITNESSETH**, (a) that in order to discharge the said sum of 10,000*l.* three per cent. consolidated bank annuities, or any stocks, funds or securities, in or upon which the same may be invested, from the trusts declared by the said recited will, and for defeating all estates tail directed to be limited or created in the lands thereby directed to be purchased as aforesaid, and all remainders, reversions, estates, rights, interests and powers, to take effect after the determination or in defeasance of such estates tail, and to the intent that the said W. Evans and E. Evans may acquire the absolute interest in and power of disposition over the same sum, and also in consideration of the sum of 5*s.* of lawful money of Great Britain to each of them the said W. Evans and E. Evans paid by the said A. B. at or before the sealing and delivery of these presents, the several receipts whereof are hereby acknowledged, the said W. Evans, according to his interest in the premises hereinafter assigned, and the said E. Evans, under and by virtue and in pursuance of the power or provision for that purpose given by or contained in an act of parliament passed in the session of parliament held in the third and fourth years of the reign of his majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple Modes of Assurance;" and with the consent and approbation of the said W. Evans, testified by his being a party to and sealing and delivering these presents, **HAVE**, and each of them **HATH**, bargained, sold, assigned, transferred, and set over, and by these presents **DO**, and each of them **DOETH**, bargain, sell, assign, transfer, and set over, unto the said A. B., his executors, administrators, and assigns, **ALL THAT** the said sum of 10,000*l.* three per cent. consolidated bank

(a) It will be observed, that the act of parliament requires a disposition of this kind to be effected by an assignment, otherwise it might probably have been considered sufficient for the tenant for life and remainder man to have declared by deed to be inrolled, that the stock should be discharged from the trusts of the will, and that the trustees should transfer, or stand possessed of the stock, to such persons, or upon such trusts, as the interested parties directed, without the formality of an assignment to a third party.

annuities, now standing in the names of the said [*trustees*] in the books of the Governor and Company of the Bank of England as aforesaid, and the stocks, funds, and securities in or upon which the same shall be laid out or invested, and the interest, dividends, and annual proceeds now due or hereafter to become due in respect of the same; and also all other the stocks, funds, trust monies and securities now vested in or standing in the names of the said [*trustees*], the produce of which, under the trusts of the said recited will of the said [*testator*], is subject, or, in case these presents had not been executed, would have been subject to be laid out and invested in the purchase of lands to be settled as aforesaid; And all the right, title, interest, property, claim and demand whatsoever of them the said W. Evans and E. Evans, and each of them, of, in, to, from, or out of the stocks, funds, securities, and premises hereby assigned, or expressed and intended so to be, and every part thereof, **TO HAVE, Habendum.** **HOLD, RECEIVE, TAKE, AND ENJOY,** the stocks, funds, and securities, and all and singular other the premises hereby assigned, or expressed and intended so to be, unto and by the said A. B., his executors, administrators, and assigns, to the intent and purpose that the same may be freed and absolutely discharged of and from all the trusts, directions, powers, and authorities in and by the said recited will of the said [*testator*] expressed, declared, and contained of and concerning the clear residuary personal estate of the said [*testator*], and also of and from all estates tail and other interests whatsoever to which the lands directed to be purchased and settled as aforesaid would have been subject, in case such purchase and settlement as aforesaid had been actually made and executed: (b) And it is hereby declared and agreed by and between the parties to these presents, that the said A. B., his executors, administrators, and assigns, and also the said [*trustees*], and their respective executors, administrators, and assigns, shall henceforth stand and be possessed of and interested in all and singular the stocks, funds, securities, and other premises hereby assigned, or expressed and intended so to be, and every part thereof, **UPON TRUST** for such person or persons, and for such intents and purposes as the said W. Evans and E. Evans shall by any writing or writings under their hands jointly direct or appoint; and in default of such direction or appointment,

Declaration
of trust of the
stock.

(b) Where the parties assigning are not to receive the money or stock, the usual power of attorney and of giving discharges should be inserted.

THEN AS TO AND CONCERNING 2000*l.* three per cent. consolidated bank annuities, part of the said sum of 10,000*l.* like annuities, and the interest, dividends, and annual proceeds henceforth to become due in respect of the said sum of 2000*l.* like annuities, IN TRUST for the absolute use and benefit of the said W. Evans, his executors, administrators, and assigns, and to be transferred as he or they shall direct, in full satisfaction for the estate or interest of the said W. Evans of and in the said trust monies, stocks, funds, and securities, or in the lands and hereditaments by the said recited will directed to be purchased therewith as aforesaid: AND AS TO AND CONCERNING the sum of 8000*l.* three per cent. consolidated bank annuities, (residue of the said sum of 10,000*l.* like annuities,) and all dividends henceforth to become due in respect thereof, and all other the premises hereby assigned, or expressed and intended so to be, (subject to the said sum of 2000*l.* like annuities, and the dividends thereof, so to be held in trust for or to be transferred to the said W. Evans as aforesaid,) IN TRUST for the said E. Evans, his executors, administrators, and assigns, and to be paid or transferred to him or them, or as he or they shall direct. Provided always, and it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the said W. Evans, his executors, administrators, and assigns, for the said sum of 2000*l.* three per cent. consolidated bank annuities, and the dividends thereof, or the produce thereof respectively, and the receipt or receipts in writing of the said E. Evans, his executors, administrators, and assigns, for the said sum of 8000*l.* like annuities, and the dividends thereof, or the produce thereof respectively, shall be respectively good and effectual releases and discharges to the said [trustees], and their respective executors, administrators, and assigns, without any further or other direction or authority from the said A. B., his executors, administrators, or assigns, and that he and they respectively shall not be answerable or accountable for any misapplication or non-application of the said trust monies, stocks, and funds, or the dividends thereof, or of any part thereof respectively. IN WITNESS, &c. (c)

Receipts of parties entitled to be sufficient discharges.

(c) It is apprehended, that after the due execution and enrolment of this deed in Chancery, that the trustees, in whose names the stock is standing, will be justified in transferring it according to the trusts of this deed. If W. Evans or E. Evans have created any incumbrances affecting the fund, of which

the premises, do hereby declare and direct, that the stocks, funds, securities, and trust monies hereby assigned, or expressed and intended so to be, shall from henceforth be and be deemed to be of the nature and quality of personal estate to and for all intents and purposes whatsoever, any rule of equity to the contrary notwithstanding, and that the same, or any part thereof, shall not be laid out by the said [trustees] in the purchase of lands and hereditaments, pursuant to the directions for that purpose contained in the said recited will of the said [testator]. IN WITNESS, &c. (a)

shall be considered as personal estate.

(a) This deed must be enrolled in Chancery within six calendar months after its execution. (See *ante*, p. 359.) Money directed to be laid out in the purchase of lands is, for all the purposes for which it is so directed to be invested, impressed in equity with the qualities of *real estate*; it will descend to the heir, it will be real assets for payment of debts, and will pass by a devise of lands and hereditaments. It is, however, competent to the parties having absolute interests in such money, by a declaration of their intention, to take from the fund such qualities of real estate, and to make it transmissible as personality. (*Van v. Barnett*, 19 Ves. 109.)

◆

No. XXI.

RE-ASSIGNMENT (to be indorsed on last Deed), for the purpose of vesting the absolute Reversionary Interest in the Funds in the Tenant in Tail in Remainder.

THIS INDENTURE, made the — day of —, in the year of our Lord 18—, between the within-named [trustee] of the one part, and the within-named W. Evans of the other part; WITNESSETH, that in pursuance of the trusts reposed in the said [trustee] by the within-written indenture, and in consideration of the sum of 10s. of lawful money of Great Britain to the said [trustee] paid by the said W. Evans, at or immediately before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said [trustee] hath assigned, transferred, and set over, and by these presents doth assign, transfer, and set over unto the said W. Evans, his executors, administrators, and assigns, All that the within-mentioned sum of 10,000*l.* 3*l.* per cent. consolidated bank annuities, and all other the stocks, funds, securities, dividends, interest, and premises, in and by the within written indenture assigned, or expressed and

Covenant by
trustee that
he had not
incumbered.

intended so to be: AND all the right, title, interest, property, possibility, claim, and demand whatsoever, both at law and in equity, of him the said [trustee] of, in, to, or out of the same premises, and every part thereof, Together with all powers, remedies, and means whatsoever, requisite or necessary for suing for, recovering, and giving effectual releases and discharges for the same stocks, funds, securities, and premises, and every or any part thereof: TO HAVE AND TO HOLD, RECEIVE, TAKE, AND ENJOY, all and singular the premises hereby assigned, or expressed and intended so to be, unto and by the said W. Evans, his executors, administrators, and assigns, for his and their own use and benefit, as part of his and their personal estate and effects, subject nevertheless to the life interest of the within-named E. Evans in the same stocks, funds, securities, and premises: AND the said [trustee] doth hereby for himself, his heirs, executors, and administrators, covenant and declare with and to the said W. Evans, his executors, administrators, and assigns, that he the said [trustee] hath not made, done, executed, or permitted any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said stocks, funds, securities, and premises hereby assigned, or expressed and intended so to be, or any part thereof, are, is, can shall or may be charged, incumbered, or in any manner prejudicially affected in title, interest, or otherwise howsoever. IN WITNESS, &c. (a)

(a) This deed will require a 35s. stamp, but not enrolment.

ADDENDA.

Pages 12, 15, Flight v. Thomas is now reported in *Vest's R.* 671.

Page 21—after line 10 from bottom.

Amendments under section 23 of 3 & 4 Will. 4, c. 42, ~~st~~ be made during the trial and before verdict, and the ~~ge~~ cannot give the party power to amend on a future ~~r.~~ (*Brasier v. Jackson*, 6 Mees. & W. 549, 8 Dowl. P. 784; *Doe d. Bennett v. Long*, 9 Carr. & P. 773.)

Page 88—after line 19 from top.

Where parties, in possession of an easement, filed a bill to restrain the owner of the land from proceeding with an action of trespass, alleging three grounds of defence to the action, two of which were legal, and one equitable, the Court of Chancery allowed the action to proceed to judgment, inasmuch as if the legal grounds of defence should be sustained, the interposition of that court would be necessary, and if they should not be sustained and it would therefore become necessary to entertain the equitable question, that court would know what amount of damages a jury had assessed as a compensation for the easement, and be enabled to secure that amount until the ending of the cause. (*Barnard v. Wallis*, 1 Cr. & Phill. 5.)

Page 106—after line 11 from top.

Sugden, L. C. is reported to have said, that whenever a case comes before him, in which there has been an actual gift to trustees for a charitable purpose, and the question is whether the claim of the trustees for such charity is barred by the statute of limitations, he should not take upon himself the responsibility of deciding it, but would find it, as a mere legal question, to a court of law. The

Whether
trust for
charity within
the statute
of limitations.

difficulty which may arise under that statute appears to be this, that whilst in former acts, the legislature never attempted to deal with cases of trusts, but left them to be disposed of by a court of equity on equitable principles, in analogy to proceedings in the courts of law, and courts of equity thought that charities could not be affected by the lapse of time, except in the case of a purchaser for valuable consideration without notice (see 3 Sugd. V. & P. 311, 10th edit.) In the recent act 3 & 4 Will. 4, c. 27, ss. 24, 25, it has taken upon itself to deal with trusts, and to fix a period of limitation in such cases; and consequently, as a charity is a trust, a serious question may arise, as to what the effect of the statute is upon charitable trusts. (*Attorney General v. Perse*, 2 Drury & War. 68, 69.)

A testator by his will dated 4th of June, 1812, devised a rent-charge as a salary for a schoolmaster, to be appointed by the owner for the time being of the estate, on which the rent was charged. A schoolmaster was never appointed. In 1839 an information was filed to carry the said trust into execution. It was held that the statute of limitations, 3 & 4 Will. 4, c. 27, could not run until a schoolmaster was appointed. (*Attorney General v. Perse*, 2 Drury & War. 67.)

Pages 122—127.

Grant v. Ellis, is now reported in 9 Mees. & W. 113—128.

Page 126—line 2 from top.

For legislator read *legislature*.

Page 154—after line 9 from top.

During the continuance of a tenancy from year to year, the landlord mortgaged the premises, to secure the payment of an annuity. The mortgage deed contained a proviso that he should remain in receipt of the rents until sixty days after default made in payment of the annuity, it was held that as against the tenant, that before default the mortgagor had a sufficient interest in the premises remaining in him to entitle him to determine the tenancy by a notice to quit. (*Doe d. Lister v. Goldwin*, 1 Gale & Dav. 463.)

Page 163—after the case of Williams v. Cooper.

Lands being held by G. as tenant from year to year to D.; D., who died in 1837, devised the same to trustees for

term of 140 years, upon trust (*inter alia*) to permit E. D. to take the rents and profits thereof during life; G. paid the rent to E. D. the widow after D.'s death, from 1837 to 1840, and on receiving a notice to quit her in March 1840, stated that he did not think she could turn him out of possession, as she had promised he should continue on as tenant from year to year: it was held, in an action of ejectment brought by the trustees for the recovery of the premises, that this was sufficient evidence of disclaimer by G. of the title of the trustees, to warrant a jury in finding a verdict for the plaintiff. (*Doe d. Jones v. Evans*, 9 Mees. & W. 48.)

Page 170, n. (c).

It was decided that whether a writing amounts to an acknowledgment of title is a question for the judge, but E. Sugden is reported to have stated that whether it amounted to an acknowledgment of title within the 13th section is a question for a jury. (*Incorporated Society v. Richards*, 1 Drury & Warren, 290.)

Page 192—after last line.

In *Salter v. Cavanagh*, 1 Drury & Walsh, 668, it was held, that where a party had been expressly named in a will, his representatives were trustees within the 25th section of 3 & 4 Will. 4, c. 27, and that though a constructive trust would be barred by that statute, and might have been barred previously to it by length of time, yet that it only applied to cases where the trust did not arise on the face of the instrument, but was to be made out by evidence. (See *Beckford v. Wade*, 17 Ves. 87; *Townsend v. Townshend*, 1 Br. C. C. 550; 1 Cox, 28.)

Page 209—11th line from top.

Selkeld v. Johnson is now reported in 1 Hare, 196.

Page 209—after 13th line from top.

A bill was filed by the dean and chapter of Ely, the rectors of the parish of L. claiming the tithes of grain and corn for a district in the parish which had formerly been tithable, but was reclaimed about fifty years ago. It was alleged in the bill that the lands were not exempt from tithes; but it did not appear from the allegations in the bill that any tithes for corn and grain had been paid within twenty years before filing the bill to the plaintiffs or their predecessors; nor did it appear that the titheable matters were

not produced till within that period. It also appeared that in 1831 the tithes were leased for a term which was surrendered in 1837, and from that time the plaintiff claimed tithes. To this bill the defendant put in the plea of the statute of limitations, 3 & 4 Will. 4, c. 27, that neither the plaintiffs, nor those under whom they claimed, had received tithes for L. sen within twenty years before the institution of the suit, and that no acknowledgment in writing of their title had been given to the plaintiffs within that time. It was held, that notwithstanding the provisions of 2 & 3 Will. 4, c. 100, the defendant might plead the 3 & 4 Will. 4, c. 27; and such plea was allowed on the ground that it did not appear from the allegations in the bill that titheable matters were not produced till within twenty years before the suit, nor that any thing had been received by the plaintiffs or their lessees for tithes within that period. (*The Dean and Chapter of Ely v. Biss*, 6 Jurist, 496.)

Page 237—after 12th line from top.

General limitation of actions under local and personal acts.

The stat. 5 & 6 Vict. c. 97, after reciting that divers acts, commonly called public, local and personal, or local and personal acts, and divers other acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for any thing done in pursuance of the said acts respectively, and that the periods of such limitations vary very much, and it is expedient that there should be one period of limitation only, enacts, "That from and after the 10th August, 1842, the period within which any action may be brought for any thing done under the authority or in pursuance of any such act or acts shall be two years; or in case of continuing damage, then within one year after such damage shall have ceased; and that so much of any clause, provision, or enactment by which any other time or period of limitation is appointed or enacted, shall be and the same is hereby repealed." But this act does not extend to actions brought before the passing of it.

Page 255—after 27th line from top.

The 42nd section of 3 & 4 Will. 4, c. 27, which allows only six years' arrears of interest in respect of money charged on land, does not apply to a case where the person having the estate in the land out of which the charge is to be raised is a trustee for the person having the charge. (*Young v. Waterpark*, 6 Jur. 656.)

Page 269—after section 44.

bill has been introduced into the House of Lords, b, after reciting the stat. 3 & 4 Will. 4, c. 27, ss. 30, 32, 33, 44, proposes, after a day to be named, to extend to Ireland the said clauses and enactments relating to right to present to or bestow any church, vicarage, or ecclesiastical benefice (except the clause declaring the said act should not extend to Ireland). And the bill also proposes to enact that certain words therein contained shall be similarly interpreted with the same words in the act. The proposed act is not to apply to suits commenced before a day therein to be named.

Pages 290, 291—at end of sections 7, 8.

see stat. 5 Vict. sess. 2, c. 32, an act for better recording fines and recoveries in Wales and Cheshire.

Records of
fines and re-
coveries in
Wales and
Cheshire.

sect. 1. All fines levied in the late courts of great sessions in Wales, and the court of session in Cheshire, shall be held to be good in law, notwithstanding any defect in keeping the record.

sect. 2. Certain fines are taken to be levied with propriety.

sect. 3. Certain recoveries are declared to be good in law.

sect. 4. Fines and recoveries may be enrolled in the office of the registrar of the Court of Common Pleas.

The 5th section enacts, "That the Court of Common Pleas shall have the same power of amending any fine or recovery, and the record or enrolment thereof, whether now extant, or as such fine or recovery, or any proceedings thereof, shall hereafter be enrolled in manner aforesaid, as if the same had been originally levied, tried, or had in the Court of Common Pleas."

Page 380—note to section 82.

The two commissioners who take the acknowledgment of a married woman under the stat. 3 & 4 Will. 4, c. 74, must, under the 82nd section, be appointed commissioners for the same district. (*Ex parte Webster*, 1 Dowl. P. C. 1. S. 678.)

Page 383—at end of note.

A certificate of acknowledgment under 3 & 4 Will. 4, c. 74, and the affidavit thereof, stated the party to have executed deeds of lease and release, whereas she executed the latter only. Tindal, C. J., refused to allow the certificate to be amended, observing, that in some cases cited

the defect arose from the neglect of the officer; whereas in this case it was asked to alter a matter that was certified and sworn to have been executed in a particular way. (*In re White*, 3 Scott, N. C. 591.)

Page 389.

In re Bruce is now reported in 3 Scott, N. C. 592.

Page 435—after 15th line from bottom.

A. being seized in fee of copyhold property, devised the same to B. for life, remainder to her issue as tenants in common; and if but one child, then to such one, his or her heirs, &c. absolutely; and in default of such issue to his own right heirs. On the death of A., B. was admitted, and afterwards married the defendant. B. subsequently died, leaving, by the defendant, one child, C., an infant, who afterwards died, aged eight months. Immediately on the death of B., the defendant entered into the receipt of the rents and profits, and so continued from that time till the time of the action. The defendant's sisters were C.'s heirs at law and by custom. In ejectment by the heir at law of A., it was held that as C. took by purchase, actual seisin by her was not necessary in order to transmit the estate to her right heir, and that the lessor of the plaintiff was entitled to recover. *Tindal, C. J.*, said, the devisee in fee has, without an actual entry, such a seisin of the premises devised as will enable his heir to take from him by descent, and consequently to bar the heir at law of the devisor. It is the clear result of all the authorities, that wherever a party has succeeded to an estate by descent, he must obtain an actual seisin or possession, as contradistinguished from a seisin in law, in order to make himself the root or stock from which the future inheritance by right of blood must be derived; that is, in other words, in order to make the estate transmissible to heirs. It will be quite sufficient to refer to the maxim in *Fleta*, *seisin facit stipitem*, 2 Bl. Comm. 209; Co. Litt. 15 a; and to the well-known doctrine of *possessio fratris*, without citing any express authorities on this point. But the case now under consideration does not arise upon the right of the heir claiming from an ancestor who himself took by descent, and died before actual seisin, but upon the right of one who claims as heir at law of a devisee, that is, of a purchaser, who dies before the actual seisin; and the question is, whether such heir can maintain his possession against the heir of the testator. We think the right to the inheritance is in the defendant, and that he can retain

possession. (*Doe d. Parker v. Thomas*, 20 Law n. 124, C. P.; see *Doe d. Winder v. Lawes*, 7 Ad. L. 213.)

Page 482—after 9th line from top.

here the obligor of a bond, having devised his land, before the passing of the stat. 11 Geo. 4 and 1 Will. 47, it was held that the specialty creditor could not maintain an action against the devisee alone, there being no assent, under 3 W. & M. c. 14, s. 3. (*Hunting v. Sheller*, 9 Mees. & W. 256. See *Gawler v. Wade*, 1 P. n. 100.)

Page 508—after 25th line from top.

A rent charge is extinguished by a devise to the grantee of part of the land out of which the rent charge issues, notwithstanding the devise is expressly made over and subject to the rent charge. (*Dennet v. Pass*, 1 Bing. N. S. 5; 5 Moore & S. 218.)

Page 522.

The case of *Doe d. Rees v. Howell* is now reported in Ad. & Ell. 696.

Page 536—after 19th line from top.

A party having issued a *distringas* under the 5th section 5 Vict. c. 5, without filing a bill in due time afterwards, the consequence of which the *distringas* is taken off by the court, is not thereby precluded from making an application to the court under the 4th section of that act. (*In Suisse*, 6 Jur. 654.)

Page 538—at end of 8th line.

Under 1 & 2 Vict. c. 110, s. 17, a plaintiff is entitled to interest upon a judgment from the day on which it is entered, the words "entered up" in that clause having reference to the entry of the *incipitur* in the master's book; and this right is not varied by an alteration made in the amount at a subsequent period, upon a review of the taxation. It is clear, under the stat. 29 Car. 2, c. 3, s. 14, 15, that the day of signing the judgment is the day from which the judgment is to operate as against the purchaser, or in the event of death, or to gain priority against simple contract debts. (*Fisher v. Dudding*, 1 Scott, N. C. 516.)

Page 553—before two last lines from bottom.

In the case of an immediate extent, on an inquisition to find debts, the jury may find the fact of a debt being due to the crown on the sole evidence that the debt is due. (*Regina v. Ryle*, 9 Mees. & W. 227.)

Page 559—after 20th line from top.

A policy of assurance effected with a company, in which the assured participate in the profits, was deposited to secure a debt; but no notice of the deposit was given at the office until seven years afterwards, nor until after the depositor had committed an act of bankruptcy, of which, however, it did not appear that the depositary had notice. A *fiat* having issued against the debtor, it was held that under the stat. 2 & 3 Vict. c. 29, s. 1, the notice was sufficient to give the depositary a good title against the assignees. Lord *Lyndhurst* observing, after quoting the statute, that all *boná fide* dealings and transactions with the bankrupt before the *fiat*, and without notice of the act of bankruptcy, are valid. "In this case the transaction or dealing consisted of the deposit or pledge of the policy, and the notice to the assurers; which latter step, it is contended, was necessary to render the transaction binding against all other claimants. The whole of the transaction was completed before the date of the *fiat*; and it is not alleged that the transaction was not in every part of it *boná fide*, or that the parties had any notice of the act of bankruptcy; it appeared to him, therefore, that the case fell distinctly within the statute, and that the transaction was protected by it. (*Re Styau, Smith, and others*, 2 Mont. D. & G. 219.)

If an act of bankruptcy has been committed by a trader by making an assignment of all his property for the benefit of his creditors, and information of that fact is communicated to the attorney of an execution creditor previous to the issuing out of the *fi. fa.* sued out by such attorney, it is sufficient to invalidate the execution as against the assignees, notwithstanding the stat. 2 & 3 Vict. c. 29, and although the *fiat* issued after the writ was lodged with the sheriff. (*Rothwell v. Timbrell*, 1 Dowl. P. C. N. S. 778.)

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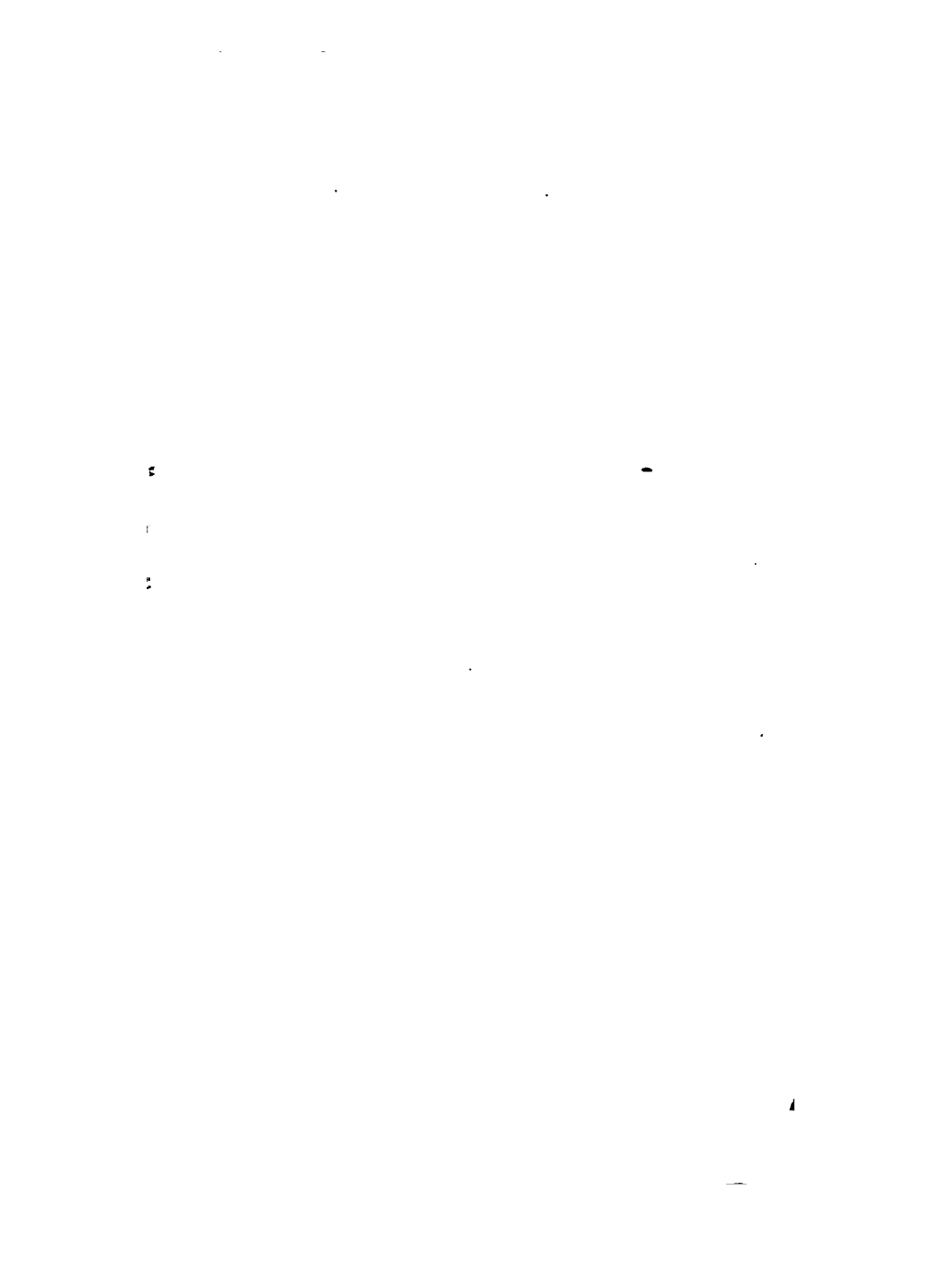
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